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RECORD.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 15,662
CIVIL.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLANT,

vs.

W. E. WILLIAMS, CHICAGO AND NORTHWESTERN RAILWAY COMPANY, A CORPORATION, AND UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

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[fol. 1] Complaint

(Filed in U. S. District Court on February 4, 1955.)

[fol. 2] District Court of the United States
Southern District of Iowa
Western Division

W. E. Williams, Plaintiff,

#1-196 vs. Civil

Chicago, Rock Island and Pacific Railroad Company. a corporation; Chicago and Northwestern Railway Company, a corporation; and Union Pacific Railroad Company, a corporation, Defendants.

Count I.

Comes now plaintiff and for cause of action against defendants states:

1. That plaintiff is a resident of the City of Council Bluffs, County of Pottawattamie, State of Iowa, and a citizen of the State of Iowa.

2. That defendant Chicago, Rock Island and Pacific Railroad Company is a corporation incorporated under the laws of the State of Delaware with its principal place of business in the City of Chicago, County of Cook, State of Illinois.

3. That defendant Chicago and Northwestern Railway Company is a corporation incorporated under the laws of the State of Wisconsin with its principal place of business in the City of Chicago, County of Cook, State of Illinois.

4. That defendant Union Pacific Railroad Company is a corporation incorporated under the laws of the State of Utah with its principal place of business in the City of Omaha, County of Douglas, State of Nebraska.

5. That the matter in controversy exceeds the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

[fol. 3] 6. That on or about the 10th day of February, 1953, plaintiff was in the employ of Kansas Grain Company, at its grain elevator, located at Thirtieth Street and First Avenue in the City of Council Bluffs, County of Pottawattamie, State of Iowa.

7. That plaintiff is informed and believes that on or about the 9th or 10th days of February, 1953, defendant Chicago, Rock Island and Pacific Railroad Company, on order of said Kansas Grain Company, sent certain box freight cars to the railroad side track of said grain company, to be loaded with grain by said company. That included in said cars was car Rock Island #145287 owned by defendant Chicago, Rock Island and Pacific Railroad Company.

8. That plaintiff is informed and believes that there is an agreement between defendants whereby defendant Chicago, and Northwestern Railway Company does all of the switching, spotting and placing of railroad cars on the sidetrack of said Kansas Grain Company and that said defendant railway company switched, spotted and placed the aforementioned car Rock Island #145287 on said sidetrack for use by said grain company on the 10th day of February, 1953.

9. That plaintiff is informed and believes that said car Rock Island #145287 was designated for shipment to Denver, Colorado via the Union Pacific Railroad Company and that said railroad company was to be the initial carrier of said car after it was loaded.

10. That at about the hour of 4:20 P.M. on the 10th day of February, 1953, plaintiff, in the course of his employment by said Kansas Grain Company, was sent to the side track

of said grain company, to close the door on the aforesaid car Rock Island #145287 after it had been loaded. That plaintiff, while lawfully and carefully endeavoring to close the door on said car, was severely and permanently injured, due to the negligence and carelessness of the defendants, in sending a car to plaintiff's employer whose door and track [fol. 4] mechanism were in a broken, dangerous, defective, unsuitable and unsafe condition; that the said door and track mechanism of said car by reason of this broken, dangerous, defective, unsuitable and unsafe condition, fell upon, crushed, bruised, and severely injured plaintiff as he attempted to close said door resulting in the damages of which he hereinafter complains.

11. That defendant Chicago, Rock Island and Pacific Railroad Company was negligent in the following respects, to-wit:

(a). In failing to properly inspect the aforementioned car Rock Island #145287.

(b). In failing to exercise reasonable and ordinary care in inspecting the aforementioned car Rock Island #145287 and to have it in such condition that it might be used with reasonable safety.

(c). In failing to give to plaintiff notice of the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(d) In failing to give to plaintiff's aforesaid employer notice of the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(e). In failing to discover by due and ordinary inspection the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(f). In failing to have said door and track mechanism of the aforesaid car Rock Island #145287 in a proper state of repair, at the time of delivery of said car to plaintiff's employer.

(g). In failing to fulfill its legal duty to persons required to go on or about its cars or cars which it furnishes or

delivers in connection with its business, and particularly said duty owed this plaintiff.

(h). In delivering the aforesaid car Rock Island #145287 in a defective, unsafe and unsuitable condition.

(i). In furnishing the aforesaid car Rock Island #145287 in a defective unsafe and unsuitable condition.

(j). In failing to disclose hidden defects in the said door and track mechanism of the aforesaid car Rock Island #145287.

(k). In furnishing the aforesaid car Rock Island #145287 with the said door and track mechanism in a defective, unsafe and unsuitable condition.

(l). In delivering the aforesaid car Rock Island #145287 with the said door and track mechanism in a defective, unsafe and unsuitable condition.

[fol. 5] (m). In failing to furnish the shipper, plaintiff's employer, with a car in such condition it could be used by plaintiff in closing door of same with reasonable safety.

12. That defendant Chicago, and Northwestern Railway Company was negligent in the following respects, to-wit:

(a). In failing properly inspect the aforementioned car Rock Island #145287.

(b). In failing to exercise reasonable and ordinary care in inspecting the aforementioned car Rock Island #145287 and to have it in such condition that it might be used with reasonable safety.

(c). In failing to give to plaintiff notice of the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(d). In failing to give to plaintiff's aforesaid employer notice of the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(e). In failing to discover by due and ordinary inspection the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(f). In failing to have said door and track mechanism of the aforesaid car Rock Island #145287 in a proper state of repair, at the time of delivery of said car to plaintiff's employer.

(g). In failing to fulfill its legal duty to persons required to go on or about its cars or cars which it furnishes or delivers in connection with its business, and particularly said duty owed this plaintiff.

(h). In delivering the aforesaid car Rock Island #145287 in a defective, unsafe and unsuitable condition.

(i). In furnishing the aforesaid car Rock Island #145287 in a defective unsafe and unsuitable condition.

(j). In failing to disclose hidden defects in the said door and track mechanism of the aforesaid car Rock Island #145287.

(k) In furnishing the aforesaid car Rock Island #145287 with the said door and track mechanism in a defective, unsafe and unsuitable condition.

(l). In delivering the aforesaid car Rock Island #145287 with the said door and track mechanism in a defective, unsafe and unsuitable condition.

(m). In failing to furnish the shipper, plaintiff's employer, with a car in such condition it could be used by plaintiff in closing door of same with reasonable safety.

13. That defendant Union Pacific Railroad Company was negligent in the following respects, to-wit:

(a). In failing to properly inspect the aforementioned [fol. 6] car Rock Island #145287.

(b). In failing to exercise reasonable and ordinary care in inspecting the aforementioned car Rock Island #145287 and to have it in such condition that it might be used with reasonable safety.

(c). In failing to give to plaintiff notice of the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(d). In failing to give to plaintiff's aforesaid employer notice of the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(e). In failing to discover by due and ordinary inspection the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(f). In failing to have said door and track mechanism of the aforesaid car Rock Island #145287 in a proper state of repair, at the time of delivery of said car to plaintiff's employer.

(g). In failing to fulfill its legal duty to persons required to go on or about its cars or cars which it furnishes or delivers in connection with its business, and particularly said duty owed this plaintiff.

(h). In d e l i v e r i n g the aforesaid car Rock Island #145287 in a defective, unsafe and unsuitable condition.

(i). In f u r n i s h i n g the aforesaid car Rock Island #145287 in a defective unsafe and unsuitable condition.

(j). In failing to disclose hidden defects in the said door and track mechanism of the aforesaid car Rock Island #145287.

(k). In f u r n i s h i n g the aforesaid car Rock Island #145287 with the said door and track mechanism in a defective, unsafe and unsuitable condition.

(l). In delivering the aforesaid car Rock Island #145287 with the said door and track mechanism in a defective, unsafe and unsuitable condition.

(m). In failing to furnish the shipper, plaintiff's employer, with a car in such condition it could be used by plaintiff in closing door of same with reasonable safety.

14. That plaintiff was not guilty of contributory negligence.

15. That the negligence of defendants was the proximate cause of the injuries and damage of which plaintiff hereinafter complains.

16. That by reason of the aforesaid negligent acts of the defendants plaintiff was thrown to the ground with great force and violence and crushed beneath the falling steel [fol. 7] door of said box freight car and sustained severe frightful and painful injuries, both temporary and permanent, consisting of lacerations, abrasions and contusions about his head, legs and body, fractures of the tenth and eleventh dorsal and fourth lumbar vertebrae and a fracture of the lower end of the right tibia with pulverization of the lower and of the fibula, and loss of two upper incisor and one lower incisor teeth. That as a result of said injuries plaintiff sustained great shock and severe pain and suffering, and further, that plaintiff was immobilized and placed and remained in a body cast from the 17th day of February, 1953 to the 25th day of May, 1953; that there was an open reduction of the fractured tibia with two metal screws inserted to hold the bone fragments in place; that his right leg was immobilized and placed and remained in a cast from February 17, 1953 to July 31, 1953; further that plaintiff was totally disabled from February 10, 1953 until June 30, 1954 and sustained loss of earnings in said period in the amount of $4,445.20; that since said period plaintiff has been unable to obtain gainful employment due to the general weakness of his body and has sustained further loss of earnings to date of commencement of this suit in the amount of $1,478.40 and shall sustain loss of earnings in the future; that plaintiff is fifty-nine years of age and has a life expectancy of 15.13 years and his weakly earnings for a 40-hour week in the employment held by him at the time of his injury were in the amount of $61.60 per week; that as a further result of said injuries there is an angulation of plaintiff's spine to the left at the region of the ninth thoracic vertebra and some increase in the dorsal rounding and plaintiff shall suffer backaches the rest of his life; further, that plaintiff walks with a right limp; further that there is a post operative scar on the lower extremity of his right leg four and one-half inches in length; that plaintiff

has sustained permanent disability in his spine and an arthritic condition is developing as a result of said injuries. That as a result of the above and foregoing plaintiff has sustained great physical and mental pain and anguish and shall sustain such pain and suffering in the future.

[fol. 8] 17. That by reason of the aforementioned physical injuries resulting from the negligent acts of the defendants plaintiff has sustained medical and hospital expense in the amount of $1,788.95 and will sustain medical and hospital expense in the future.

Wherefore, plaintiff prays for judgment against defendants, jointly and/or severally in the amount of One Hundred Seven Thousand Seven Hundred Twelve and 55/100 Dollars ($107,712.55) together with interest at five per cent (5%) per annum from the 10th day of February, 1953 and for the costs of this action.

Count II.

Comes now plaintiff and for cause of action against dedendant states:

1. That plaintiff incorporates by reference paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of Count I.

2. That at about the hour of 4:20 P.M. on the 10th day of February, 1953, plaintiff in the course of his employment by said Kansas Grain Company, was sent to the side track of said grain company, to close the door on the aforesaid car Rock Island #145287 after it had been loaded. That plaintiff while lawfully and carefully endeavoring to close the door on said car, was severely and permanently injured, due to the joint and concurrent negligence of the defendants and each of them, in sending and delivering to plaintiff's employer a car, whose door and track mechanism was in a broken, dangerous, defective, unsuitable and unsafe condition; that the said door and track mechanism, by reason of its broken, dangerous, defective, unsuitable and unsafe condition, fell upon, crushed, bruised, and severely injured plaintiff as he attempted to close said door resulting in the damages of which he hereinafter complains.

3. That plaintiff incorporates by reference paragraphs 14, 15, 16 and 17 of Count I.

Wherefore, plaintiff prays for judgment against defend-
[fol. 9] ants, jointly and/or severally in the amount of One Hundred Seven Thousand Seven Hundred Twelve and 55/100 Dollars ($107,712.55) together with interest at five per cent (5%) per annum from February 10, 1953 and the costs of this action.

[fol. 10] (Memorandum relating to Summons)

Summons was issued by the Deputy Clerk of the District Court, and return thereon showing legal service on each of defendants on February 8, 1955, was made by the United States Marshal.

[fol. 11] Answer of Defendant, Chicago, Rock Island and Pacific Railroad Company.

(Filed U. S. District Court on February 28, 1955.)

[fol. 12] Defendant, Chicago, Rock Island and Pacific Railroad Company, for answer to plaintiff's complaint, states and shows the Court as follows:

Answer to Count I.

1. Defendant, Chicago, Rock Island and Pacific Railroad Company, for its answer to Count I of plaintiff's complaint, admits the allegations of paragraphs 1, 2, 3, 4, 5, and 6 of plaintiff's complaint.

2. This defendant, for answer to the allegations of paragraph 7 of plaintiff's complaint, admits that on or about February 9, 1953, this defendant was the owner of a certain box car designated as R. I. 145287; and, that said car was in the City of Council Bluffs, Pottawattamie County, Iowa, on said date. This defendant denies each, all and every allegation set forth in paragraph 7 of plaintiff's complaint, except those hereinbefore expressly admitted.

3. This defendant, for answer to the allegations of paragraph 8 of plaintiff's complaint, admits that there is an agreement between Chicago, Rock Island and Pacific Railroad Company and Chicago and Northwestern Railway Company with respect to the maintenance, use and operation of a certain track or trackage known as the River [fol. 13] Track in the City of Council Bluffs, Iowa, but this defendant denies each, all and every allegation set forth in paragraph 8 of said complaint, except those hereinbefore expressly admitted.

4. This defendant has neither information or knowledge with respect to the matters and facts referred to in paragraph 9 of plaintiff's complaint, and therefore denies same.

5. This defendant denies each, all and every allegation set forth in paragraph 10 of plaintiff's complaint, except that this defendant admits that on or about the 10th day of February, 1953, plaintiff was about car R. I. 145287, then spotted at a point on or near the elevator of the Kansas Grain Company located in the City of Council Bluffs, Pottawattamie County, Iowa.

6. This defendant denies each, all and every allegation contained in paragraph 11 of plaintiff's complaint.

7. This defendant denies each, all and every allegation set forth in paragraph 12 of plaintiff's complaint.

8. This defendant denies each, all and every allegation set forth in paragraph 13 of plaintiff's complaint.

9. This defendant denies the allegations of paragraph 14 of plaintiff's complaint and alleges that if plaintiff suffered any injury or damage that same was proximately caused and contributed to by the negligence of plaintiff himself.

10. This defendant denies each, all and every allegation set forth in paragraph 15 of plaintiff's complaint.

11. This defendant denies each, all and every allegation set forth in paragraph 16 of plaintiff's complaint.

12. This defendant is without information or knowledge with respect to the matters or things set forth in paragraph 17 of the plaintiff's complaint, and therefore denies same.

Wherefore, having fully answered the allegations of Count I of plaintiff's complaint, defendant, Chicago, Rock Island and Pacific Railroad Company, prays that same be dismissed.

[fol. 14] Answer to Count II.

1. This defendant hereby incorporates, by reference, the allegations of its Answer to Count I as to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9.

2. This defendant denies each, all and every allegation set forth in paragraph 2 of plaintiff's complaint.

3. This defendant, by reference, hereby incorporates the provisions of its answer to paragraph 14, 15, 16 and 17 of Count I of plaintiff's complaint.

4. Further answering plaintiff's complaint as embodied in Count II thereof, this defendant states and shows the Court that said Count II fails to state any facts which entitle the plaintiff to the relief demanded, or to any relief, and that the allegations of Count II of plaintiff's complaint are insufficient to invoke on the plaintiff's behalf the rule of res ipsa locquitur.

Wherefore, having fully answered the allegations of Count II of plaintiff's complaint, defendant, Chicago, Rock Island and Pacific Railroad Company, prays that same be dismissed.

[fol. 15] Answer of Defendant Chicago and Northwestern Railway Company.

(Filed February 28, 1955, U. S. District Court)

[fol. 16] Comes Now the defendant Chicago and North Western Railway Company and for its separate answer to the complaint of the plaintiff filed herein states:

Count I.

1. This defendant admits the allegations of paragraph one of the complaint.

2. This defendant makes no answer to the allegations of paragraph two of the complaint, same being directed to the Chicago, Rock Island & Pacific Railway Company.

3. This defendant admits the allegations of paragraph three of the complaint.

4. This defendant makes no answer to the allegations of paragraph four of the complaint, same being directed to the defendant Union Pacific Railroad Company.

5. This defendant admits the allegations of paragraph five of the complaint.

6. This defendant admits the allegations of paragraph six of the complaint.

[fol. 17] 7. This defendant has no information as to the allegations of paragraph seven of the complaint and therefore denies same.

8. This defendant admits the allegations of paragraph eight of the plaintiff's complaint.

9. This defendant does not have any information as to the allegations of paragraph nine of the complaint and therefore denies same.

10. This defendant does not have sufficient information as to form a belief as to the allegations of paragraph ten of the complaint and therefore denies same.

11. This defendant makes no answer to the allegations of paragraph eleven of the complaint, same being directed to the Chicago, Rock Island & Pacific Railway Company.

12. This defendant denies the allegations of paragraph twelve of the complaint including subparagraphs A through M thereof.

13. This defendant makes no answer to the allegations of paragraph thirteen of the complaint, same being directed to the defendant Union Pacific Railway Company.

14. This defendant denies the allegations of paragraph fourteen of the complaint.

15. For answer to paragraph fifteen of the complaint this defendant denies that it was guilty of any negligence which was the proximate cause of injury and damage of which the plaintiff complains.

16. This defendant does not have sufficient information to form a belief as to the allegations of paragraph sixteen of the complaint and therefore denies same.

17. This defendant does not have sufficient information to form a belief as to the allegations of paragraph seventeen of the complaint and therefore denies same.

[fol. 18] Count II.

For answer to the allegations of Count II of the complaint this defendant states:

1. This defendant incorporates herein by reference with the same effect as if herein fully set out its answer to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of Count I of the complaint.

2. This defendant denies the allegations of paragraph two of the complaint.

3. For answer to paragraph three of Count II of the complaint this defendant incorporates herein by reference with the same force and effect as if herein again fully set out its answer to paragraphs 14, 15, 16 and 17 of count one of its answer.

Wherefore having fully answered the allegations of Counts I and II of the complaint this defendant prays that plaintiff's petition be dismissed as to it and that it have judgment for its costs.

[fol. 19] Answer of Defendant Union Pacific Railroad Company.

(Filed in U. S. District Court on February 28, 1955)

[fol. 20] Comes now the defendant Union Pacific Railroad Company and for its separate answer to the complaint of the plaintiff herein states:

Separate Answer to Count I of the Complaint.

1. Answering paragraph 1, the defendant admits the allegations thereof.

2. Answering paragraph 2, the defendant admits the allegations thereof.

3. Answering paragraph 3, the defendant admits the allegations thereof.

4. Answering paragraph 4, the defendant admits the allegations thereof.

5. Answering paragraph 5, the defendant admits the allegations thereof.

6. Answering paragraph 6, the defendant admits the allegations thereof.

7. Answering paragraph 7, this defendant alleges that on or about the 9th day of February, 1953, the defendant Chicago, Rock Island and Pacific Railroad Company delivered a box car belonging to said Chicago, Rock Island and Pacific Railroad Company, to-wit, No. 145287, to the Chicago and North Western Railway Company for delivery to the Kansas Grain Company for the purpose of being loaded [fol. 21] with grain by such company. Defendant further alleges that on or about the 9th day of February, 1953, the said Chicago and North Western Railway Company did deliver the said car to the Kansas Grain Company for the purpose of being loaded with grain on the side track, or industry track, serving such grain company.

8. Answering paragraph 8, this defendant admits that the defendant Chicago and North Western Railway Com-

pany switched, spotted and placed the said Rock Island Car 145287 on the track of the Kansas Grain Company for the use of said grain company, but alleges that it is informed and believes that the car referred to in said paragraph was so switched, spotted and placed on the track referred to on Feb. 9, 1953, rather than Feb. 10, 1953; defendant specifically denies that there is now or ever was at any time an agreement between defendants whereby defendant Chicago and North Western Railway Company does all the switching spotting and placing of railroad cars on the side track of said Kansas Grain Company, and alleges that this defendant is not and never was at any time a party to any agreement whatsoever with the other defendants relative to the matters referred to in said paragraph or in said complaint.

9. Answering paragraph 9, defendant denies each and every allegation thereof and alleges that at the time that Chicago, Rock Island and Pacific Railroad Company car No. 145287 was placed on the industry track of the Kansas Grain Company on Feb. 9, 1953, and at the time of the accident complained of in said complaint on Feb. 10, 1953, that the said shipment of grain to be loaded in such car, and which was in fact loaded in such car, was not designated or billed for shipment over the Union Pacific Railroad Company's lines; that it was not until Feb. 11, 1953, the day following the accident, that the said shipment was billed by the grain company for shipment by the Union Pacific Railroad Company to be shipped to Denver. Defendant further alleges that after said accident the car was not delivered to it on Feb. 11, 1953, but was retaken and repossessed by the Chicago, Rock Island [fol. 22] and Pacific Railroad Company, and that it was not until the 23rd day of February, 1953, that said car was finally delivered to the Union Pacific Railroad Company. This defendant further alleges with respect to the particular shipment involved in this accident, that it did not have possession of such car prior to the accident or at the time of the accident or prior to Feb. 23, 1953, nor did it have an opportunity to inspect such car until Feb. 23,

1953, and did not accept said car and load until Feb. 24, 1953, on which date a waybill was issued for shipment over its line; that such car and load was not transported over its line until on or after Feb. 24, 1953; that at no time did this defendant have knowledge that there was to be any such shipment over its line until on and after Feb. 11, 1953, and after the time of said accident; that said accident did not occur on this defendant's line.

10. Answering paragraph 10, this defendant admits that at about the hour of 4:20 p. m. on the 10th day of February, 1953, plaintiff, in the course of his employment by said Kansas Grain Company, was sent to the side track of said grain company to close the door on Chicago, Rock Island and Pacific Railroad Company car No. 145287 after it had been loaded. Further answering the allegations in said paragraph, this defendant specifically denies that plaintiff was injured by reason of any negligence or carelessness whatsoever on the part of this defendant either singly or in connection with the other defendants. With respect to the allegations of negligence and carelessness as alleged against the other defendants, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof. Relative to the remaining allegations in said paragraph, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

11. Answering paragraph 11 and each and every subparagraph thereof, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

12. Answering paragraph 12 and each and every subparagraph thereof, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 23] 13. Answering paragraph 13, this defendant denies each and every allegation of said paragraph and each and every allegation of each subparagraph thereof.

14. Answering paragraph 14, this defendant denies each and every allegation therein contained.

15. Answering paragraph 15, this defendant specifically denies that the proximate cause of the injuries and damage of which plaintiff complains was the negligence of this defendant either singly or in connection with the other defendants, and allegations that this defendant was not negligent or careless in any manner whatsoever, and that no act of this defendant of any nature caused or contributed to cause the accident. As to the remaining allegations in such paragraph contained, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

16. Answering paragraph 16, this defendant specifically denies that the matters referred to therein were the result of any negligent act or any act whatsoever upon the part of this defendant, either singly or in connection with the other defendants. As to the remaining allegations in such paragraph contained, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

17. Answering paragraph 17, this defendant specifically denies that the plaintiff's injuries resulting from such accident were the result of any negligence whatsoever upon the part of this defendant, either singly or in connection with the other defendants. Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations in said paragraph.

18. Further answering said complaint, this defendant denies that the plaintiff is entitled to recover the sum of $107,712.55 or any other amount from this defendant.

[fol. 24] Separate Answer to Count II of the Complaint.

1. Answering paragraph 1 thereof, this defendant incorporates by reference paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of its answer to Count I of the complaint.

2. Answering paragraph 2, this defendant admits that at about the hour of 4:20 P. M. on the 10th day of Febru-

ary, 1953, plaintiff in the course of his employment by said Kansas Grain Company was sent to the side track of said grain company to close the door on the aforesaid car Rock Island No. 145287 after it had been loaded; defendant denies each and all of the remaining allegations in said paragraph contained.

3. Answering paragraph 3, this defendant incorporates by reference paragraphs 14, 15, 16 and 17 of its answer to Count I of the complaint.

4. Further answering said complaint, this defendant denies that the plaintiff is entitled to recover the sum of $107,712.55 or any other amount from this defendant.

Wherefore, this defendant prays that the said complaint be dismissed as to it as to both Count I and Count II thereof and that it have and recover its costs herein.

[fol. 25] Plaintiff's Demand for Jury Trial

(Filed U. S. District Court, March 9, 1955)

Comes now plaintiff in the above entitled cause and respectfully demands trial by jury of any issue in the above entitled cause triable of right by a jury.

[fol. 26] Pursuant to notice to counsel for all parties, a pre-trial conference was held at Council Bluffs, Iowa, on March 16, 1955 at which plaintiff appeared by his attorney, Harold Beckman; defendant Chicago, Rock Island & Pacific Railroad Company appeared by its attorneys, A. B. Howland and B. A. Webster, Jr.; defendant Union Pacific Railroad Company appeared by J. H. Anderson, its attorney, and defendant Chicago & Northwestern Railway Company appeared by Frank W. Davis and Ray L. Johnson, Jr., its attorneys, and at the conclusion of said proceeding the court made and entered the following:

Order on First Pre-Trial Conference.

(Filed U. S. District Court, March 18, 1955.)

[fol. 27] This Court having ordered the attorneys for the parties in the above cause to appear before it for pretrial conference as permitted by Rule 16 of the Federal Rules of Civil Procedure, and the attorneys having appeared and a a conference having been had on this 16th day of March, 1955, at Council Bluffs, Ia., and stipulations and agreements having been made between the parties concerning certain phases of the case, and the Court being fully advised in respect thereof, now finds that the following order should be entered herein:

It is Ordered by the Court that the subsequent course of the above entitled action shall be controlled by the following, unless modified by the Court to prevent manifest injustice:

[fol. 28] 1. It is agreed that there is requisite diversity of citizenship, and the amount in controversy, exclusive of interest and costs, exceeds $3,000.

2. It is requested that before trial counsel for the defendants Rock Island and Northwestern Railways agree as to the time and place of delivery of Rock Island car number 145287 to the Northwestern, and the time that the car was spotted on the side track of Kansas Grain Co.

3. It is requested that counsel for the plaintiff furnish to counsel for the defendants an instrument certified by one of the officials of the Kansas Grain Co., indicating the period of employment of plaintiff, the nature of his duties, and his rate of pay for the period six months prior to February 10, 1953. This record will be furnished to counsel for the defendants for such verification by them as they desire. If agreement cannot be reached as to the authenticity of this certificate and its use at time of trial the Court will be informed before trial.

4. It is agreed that cousel for the plaintiff will submit to counsel for the defendants itemized statements of medical, hospital and dental bills, and any other expenses for which he expects to make claim at time of trial, and that agreement will be reached, if possible, between counsel as to the fair and reasonable value of the services represented thereby.

5. Plaintiff has produced a number of photographs and indicated his intention to offer them at the time of trial. It is agreed among counsel that they will make examination before trial and attempt to agree as to identification, reserving to counsel for each defendant the right to make such objection as they may desire at the time of trial as to materiality and relevancy. In the event there is lack of agreement the Court will be notified.

6. Counsel for the plaintiff is asked to furnish with each copy of the photographs as offered to defendants' counsel the legend indicating time, place of taking, and the position of the camera. In the event it is impossible to obtain copies the photographs will be made available to the defendants [fol. 29] for their own complete examination of the objects photographed, and the legends likewise furnished.

7. It is indicated by counsel for the defendants that some or all of them may have photographs to be offered at time of trial, and those will be presented to counsel for the plaintiff with like information as requested in the foregoing paragraph, and agreement will be reached as to identification. In the absence of such agreement, again the Court will be notified.

8. If any plat is to be offered by any party at the time of trial agreement will be reached before trial as to identification.

9. Leave is granted to counsel for the defendants to file such amendments to their pleadings as they may desire.

10. It is requested that because of questions arising among the defendants as to liability, if any, to the plaintiff, that counsel attempt by written stipulation to agree upon what the records of each defendant may disclose as to the time of delivery of the car in question by the Rock Island to the Northwestern, and the handling of the same by the Northwestern, and the handling of the same by the Union Pacific, and any other matters pertinent thereto, and that such stipulation be completed, if possible, by May 1st. Following such agreement and any depositions that may be

necessary in relation thereto, it is requested that counsel file any amendments raising any question by way of cross claim within thirty days thereafter.

11. It is evident that depositions are to be taken, and it is agreed that in the taking thereof counsel will stipulate as to the time and place, and make notice unnecessary.

12. In the event a physical examination of the plaintiff is sought by the defendants or any of them it is agreed that the plaintiff will make himself available at a time and place to be agreed upon among counsel for examination by such physicians as will be agreed upon by all defendants or those [fol. 30] seeking the examination, and that there will be no other examination except as may be required as a result of that undertaken. It is understood that the physicians will be those selected by the defendants.

13. It is agreed that counsel for the plaintiff will furnish to counsel for the defendants before such examination copies of the medical report of plaintiff's physician, and likewise counsel for the defendants will furnish to counsel for the plaintiff copies of the medical reports made as a result of any examination of the plaintiff.

14. It is evident that following the proceedings outlined above a subsequent pre-trial conference will be held at a time and place of which counsel will receive notice. It is urged that counsel try to have all of these matters concluded to permit a pretrial conference not later than September 1st, 1955.

[fol. 31] Cross-Claim of Defendant, Chicago and Northwestern Railway Company Against Defendant, Chicago, Rock Island and Pacific Railroad Company.

(Filed U. S. District Court, August 18, 1955.)

[fol. 32] Count I.

Comes Now the Chicago and North Western Railway Company and, for its cross-claim against the defendant, Chicago, Rock Island and Pacific Railroad Company, states:

1. That Chicago and North Western Railway Company is a corporation organized and existing under the laws of the State of Wisconsin; that Chicago, Rock Island and Pacific Railroad Company is a corporation organized and existing under the laws of the State of Delaware; that each of said railway companies is qualified to do business in the State of Iowa as a common carrier of passengers and freight for hire, each maintaining lines of railroad in Pottawattamie County, Iowa, and that the plaintiff herein is a resident of Council Bluffs, Pottawattamie County, Iowa.

2. That Chicago and North Western Railway Company owns an industry track in the City of Council Bluffs, com- [fol. 33] monly referred to and designated as the River Track, which said track extends from a point near 16th Street in the City of Council Bluffs in a westerly direction to a point near the easterly side of the Missouri River.

3. That there are certain sidings connected to the River Track, which serve numerous industries located on or adjacent to the River Track, including a grain elevator owned by Kansas Grain Company, which said sidings are owned, operated and maintained jointly by the Chicago and North Western Railway Company, Chicago, Rock Island and Pacific Railroad Company and Chicago, Burlington and Quincy Railroad Company. Under agreements between the three said railroads, the Chicago and North Western Railway Company performs all switching on the said River Track and its sidings, including the sidings serving the Kansas Grain Company.

4. On or about the 28th day of January 1953, Kansas Grain Company placed with the office of the local freight agent of the Chicago, Rock Island and Pacific Railroad Company, at Omaha, Nebraska, an order for thirty-five (35) empty box cars, which order was recorded in what is designated as the Car Order Book in the office of the local agent of the Rock Island at Omaha, Nebraska.

5. On February 7, 1953, pursuant to said order, Chicago, Rock Island and Pacific Railroad Company car No. RI 145287 was inspected by one Bert Neumann, an employee of the Rock Island, who approved the car as being suitable for

grain loading and carded the same "O.K. for grain loading". No further inspection or record of inspection was [fol. 34] made by any employee of the Chicago, Rock Island and Pacific Railroad Company of car No. RI 145287 prior to the injuries claimed to have been sustained by the plaintiff herein.

6. On February 9, 1953, car No. RI 145287, along with two other cars, was set out on the 17th Street connecting track to the River Track by a switch crew of the Chicago, Rock Island and Pacific Railroad Company. Said connecting track is owned jointly by the Chicago, Rock Island and Pacific Railroad Company, Chicago and North Western Railway Company and the Chicago, Burlington and Quincy Railroad Company and is the connection with the River Track hereinbefore referred to, at which cars are set out by the Rock Island for movement in industries located on the River Track, including the Kansas Grain Company, by the Chicago and North Western Railway Company pursuant to agreements between the three railroads named therein. Thereafter, on the 9th day of February 1953, a switch crew of the North Western took said Rock Island car No. 145287 off of the 17th Street track and set said car at the elevator track of the Kansas Grain Company pursuant to the agreements relative to switching then in existence between the three railroads named therein.

7. Pursuant to standard custom and practice of the railroads delivering cars for loading by the Kansas Grain Company, the Chicago, Rock Island and Pacific Railroad Company undertook to make, and did make, an inspection of car No. RI 145287 for defects and suitability for loading grain before placing said car on the 17th Street track and, in accordance with said standard custom and practice, no inspection of said car was made by the Chicago and North Western Railway Company prior to the time of the hap- [fol. 35] pening of the claimed injuries to the plaintiff herein.

8. Car RI 145287 was loaded with shelled corn at the elevator of the Kansas Grain Company on the afternoon

of February 10, 1953 by employees of said elevator company, including the plaintiff herein, and on said date plaintiff alleges he received the injuries complained of in the complaint while working on or about said car while located at the elevator of the Kansas Grain Company.

9. The plaintiff claims in the 10th paragraph of his complaint that about 4:30 P.M. on the 10th day of February 1953 he received the injuries complained of while endeavoring to close the door on Rock Island car No. 145287 after it had been loaded, and in the 12th paragraph of his complaint the plaintiff charges that the Chicago and North Western Railway Company was negligent in the following respects, to wit:

"(a) In failing properly to inspect the aforementioned car Rock Island #145287.

(b) In failing to exercise reasonable and ordinary care in inspecting the aforementioned car Rock Island #145287 and to have it in such condition that it might be used with reasonable safety.

(c) In failing to give to plaintiff notice of the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(d) In failing to give to plaintiff's aforesaid employer notice of the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(e) In failing to discover by due and ordinary inspection the defects in said door and track mechanism of the aforesaid car Rock Island #145287.

(f) In failing to have said door and track mechanism of the aforesaid car Rock Island #145287 in a proper state of repair, at the time of delivery of said car to plaintiff's employer.

[f. l. 36] (g) In failing to fulfill its legal duty to persons required to go on or about its car or cars which it furnishes or delivers in connection with its business, and particularly said duty owed this plaintiff.

(h) In delivering the aforesaid car Rock Island #145287 in a defective, unsafe and unsuitable condition.

(i) In furnishing the aforesaid car Rock Island #145287 in a defective, unsafe and unsuitable condition.

(j) In failing to disclose hidden defects in the said door and track mechanism of the aforesaid car Rock Island #145287.

(k) In furnishing the aforesaid car Rock Island #145287 with the said door and track mechanism in a defective, unsafe and unsuitable condition.

(l) In delivering the aforesaid car Rock Island #145287 with the said door and track mechanism in a defective, unsafe and unsuitable condition.

(m) In failing to furnish the shipper, plaintiff's employer, with a car in such condition it could be used by plaintiff in closing door of same with reasonable safety." and by reason thereof, plaintiff seeks to recover from the Chicago and North Western Railway Company the sum of One Hundred Seven Thousand, Seven Hundred Twelve and 55/100 Dollars ($107,712.55) with interest thereon at five per cent (5%) per annum from February 10, 1953 and for the costs of this action on account of personal injuries claimed to have been sustained by the plaintiff while attempting to close the door on the said Rock Island car No. 145287.

10. As between the Chicago and North Western Railway Company and the Chicago, Rock Island and Pacific Railroad Company the primary obligation and duty towards the plaintiff, with respect to the negligence charged in the complaint, rested upon the Chicago, Rock Island and Pacific Railroad Company, and any duty or obligation that the Chicago and North Western Railway Company may have had to the plaintiff was secondary only.

[fol. 37] 11. That if the plaintiff herein was injured as alleged in the complaint, the said injuries were solely caused or contributed to by his own fault and negligence, or by the primary, active and positive negligence of the Chicago,

Rock Island and Pacific Railroad Company in one or more of the respects charged in the complaint, and the said Chicago, Rock Island and Pacific Railroad Company is primarily liable for any injury or damage which may have been sustained or suffered by the plaintiff herein.

12. As a result of the matters alleged in the complaint the answer of the Chicago and North Western Railway Company, the cross-claim of the Chicago and North Western Railway Company, or any of them, the Chicago and North Western Railway Company may be held liable to the plaintiff for all or a part of the loss or damage claimed to have been sustained by the plaintiff, in which event the Chicago and North Western Railway Company will have been held liable to the plaintiff only as a result of the primary, active or positive negligence of the Chicago, Rock Island and Pacific Railroad Company which caused the injury or damage to the plaintiff, and the said Chicago, Rock Island and Pacific Railroad Company will be liable to the Chicago and North Western Railway Company to indemnify it for all such loss or damage as it, the Chicago and North Western Railway Company, may suffer and the said Chicago and North Western Railway Company asserts in this cross-claim its right to such indemnity from the Chicago, Rock Island and Pacific Railroad Company.

[fol. 38] Count II

Comes Now the Chicago and North Western Railway Company and, for Count II of its cross-claim against the Chicago, Rock Island and Pacific Railway Company, states:

1. Chicago and North Western Railway Company incorporates herein by reference, with the same force and effect as if herein again fully set out, paragraphs 1 to 12 inclusive of Count I of the cross-claim.

2. That on or about the 15th day of December 1941, a certain written agreement was entered into between Charles M. Thompson, Trustee of the property of the Chicago and North Western Railway Company, predecessor in interest to the Chicago and North Western Railway Company; Frank O. Lowden, James E. Gorman, Joseph B. Fleming.

Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, predecessors in interest to the Chicago, Rock Island and Pacific Railway Company; and Chicago, Burlington and Quincy Railroad Company, under the terms of which agreement, the Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company agreed to indemnify the Trustee of the Chicago and North Western Railway Company against loss and injury sustained by persons other than joint employees caused by the sole negligence of its sole employees or the concurring negligence of its sole employees and said joint employees, a true copy of said contract of December 15, 1941 being hereto attached, marked Exhibit "A", and by this reference made a part hereof. The indemnifying provisions of said contract were subsequently ratified and confirmed in a subsequent agreement entered into on June 1, 1945 between the Chicago [fol. 39] and North Western Railway Company, successor in interest to the property of the Chicago and North Western Railway Company administered by Charles M. Thomson, Trustee; Joseph B. Fleming and Aaron Colnon, successors in interest as Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company and others, a true copy of said agreement of June 1, 1945 being hereto attached, marked Exhibit "B", and by this reference made a part hereof.

3. Subsequently, and on the 2nd day of January 1948, a further supplemental agreement was entered into by and between the Chicago and North Western Railway Company; Chicago, Rock Island and Pacific Railroad Company, successor in interest to the property of the Chicago, Rock Island and Pacific Railway Company administered by Frank O. Lowden, Joseph B. Fleming and Aaron Colnon, as Trustees, and others ratifying each and all of the terms, covenants and conditions of the agreement of December 15, 1941, herein referred to as Exhibit "A", in all respects as if the railway companies had originally entered into said agreement as the parties respectively thereto. A true copy of said supplemental agreement dated January 2, 1948 is attached hereto, marked Exhibit "C", and by this reference made a part hereof. All of said covenants and agreements relating to indemnity remained in full force and effect and binding upon the Chicago and North Western Railway

Company and the Chicago, Rock Island and Pacific Railroad Company on the 10th day of February 1953.

4. Under the provisions of said contracts and more particularly paragraph 6 of the agreement of December 15, 1941, the Chicago, Rock Island and Pacific Railroad Company agreed to indemnify the Chicago and North Western [fol. 40] Railway Company against loss and injuries sustained by persons others than joint employees caused by the sole negligence of its sole employees or the concurring negligence of its sole employees and the joint employees of the parties to said agreement.

5. The injuries and damage herein claimed by the plaintiff were injuries and damage sustained by one other than a joint employee of the Chicago and North Western Railway Company and the Chicago, Rock Island and Pacific Railroad Company and were caused by the sole negligence of the sole employees of the Chicago, Rock Island and Pacific Railroad Company or the concurring negligence of the sole employees of the Chicago, Rock Island and Pacific Railroad Company and the joint employees of the parties to the agreement as defined in said contract.

Wherefore, defendant, Chicago and North Western Railway Company, demands judgment that if there is any liability to the plaintiff, the defendant, Chicago, Rock Island and Pacific Railroad Company be adjudged solely liable to the plaintiff, and in the event a verdict is recovered by the plaintiff against the Chicago and North Western Railway Company, that the defendant, Chicago, Rock Island and Pacific Railroad Company, be held primarily liable and that the Chicago and North Western Railway Company have judgment over and against the defendant, Chicago, Rock Island and Pacific Railroad Company, for the amount recovered by the plaintiff against it, the Chicago and North Western Railway Company, together with reasonable attorneys' fees, expenses and costs herein.

[fol. 41] Exhibit A.

This Agreement, made and entered into this 15th day of December, 1941, by and between Charles M. Thomson, Trustee of the property of Chicago And North Western Railway Company (hereinafter referred to as the "Northwestern"), Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island And Pacific Railway Company (hereinafter referred to as the "Rock Island"), Chicago, Burlington & Quincy Railroad Company (hereinafter referred to as the "Burlington") (hereinafter collectively referred to as the "Railway Companies") and J. L. Welsh, Helen V. Welsh and Dudley O. Aller, co-partners doing business as the Butler-Welsh Grain Company (hereinafter referred to as the "Grain Company"),

Witnesseth:

Whereas, the Rock Island owns a grain elevator at Council Bluffs, Iowa, which elevator is served by railway tracks shown in yellow color on blue print map dated November 3, 1941, identified "Exhibit A," attached hereto and made a part hereof, which tracks are owned and operated jointly and equally by the Railway Companies; and

Whereas, heretofore and as of July 1, 1940, the Rock Island leased said elevator to the Grain Company; and

Whereas, the Grain Company desires the continued operation by the Railway Companies over said tracks for its service; and

Whereas, the parties hereto desire to enter into an agreement providing for the ownership, operation and maintenance of said tracks;

Now, Therefore, in consideration of the premises and of the mutual and dependent covenants herein contained, it [fol. 42] is hereby agreed that:

1. The Railway Companies shall operate upon and over said tracks for the service of the Grain Company. The right of each of the Railway Companies in such operation shall be equal and shall be in accordance with such rules

and regulations as may be agreed upon by their respective Division Superintendents within whose jurisdiction said tracks are located.

2. The cost and expense of maintenance of and additions and betterments to said tracks shall be borne and paid for by the Railway Companies, who shall perform the work incidental thereto and divide the cost and expense thereof as follows: the work and labor incidental to maintenance, additions and betterments to said tracks shall be performed by the Northwestern, and the Rock Island and the Burlington each shall pay to the Northwestern promptly on presentation of bills therefor one-third (⅓) of the cost and expense thereof. Said tracks shall be and remain the property of the Railway Companies, with title thereto vested in them jointly and equally.

3. Cost and expense to the Northwestern, as the term is used in the preceding paragraph, shall be the cost to it of all items of labor and material expended by it in connection with maintenance of and additions and betterments to said tracks, plus such percentages and other charges as may be fixed from time to time by the General Managers' Association of Chicago and be in effect at the time such labor and materials are furnished.

4(a). It is understood that the movement of railroad locomotives involves some risk of fire, and the Grain Company assumes all responsibility for and agrees to indemnify the Railway Companies against loss or damage to property of the Grain Company or to property upon its premises, regardless of the Railway Companies' negligence, arising from fire caused by locomotives operated by [fol. 43] the Railway Companies on said tracks, or in their vicinity for the purpose of serving said Grain Company, except to the premises of the Railway Companies and to rolling stock belonging to the Railway Companies or to others, and to shipments in the course of transportation.

(b) As between the Railway Companies, the Rock Island assumes all responsibility for, and agrees to indemnify the Northwestern and the Burlington against, loss or damage to said grain elevator building and adjoining build-

ings owned by the Rock Island by fire arising from or caused by locomotives of the Northwestern or the Burlington operating on said tracks or in the vicinity of said elevator.

5. The Grain Company also agrees to indemnify and hold harmless the Railway Companies for loss, damage or injury from any act or omission of the Grain Company, its employees, or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said tracks; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the Grain Company, on the one hand, and the Railway Companies, or any one of them, on the other hand, it shall be borne by the contributing parties equally.

6. As between the parties herein called the Railway Companies, it is agreed that all liability, loss, damage, injury or death arising from the construction, maintenance or operation of said tracks or in connection therewith, which are not hereinabove assumed in whole or in part by the Grain Company, shall be borne by said parties upon the following basis:

(a) For the purpose of fixing responsibility hereunder it is agreed that employees of the Northwestern, including train and engine crews engaged in work train service, will [fol. 44] while engaged in the work of maintaining, repairing or renewing said tracks, or the making of any additions, betterments or changes thereto be considered and held to be the joint employees of all of said parties.

(b) The term "loss" when hereinafter used shall include loss of or damage to property and all expenses and recoveries incident thereto, and the term "injury" when hereinafter used shall include injury to or death of persons and all expenses and recoveries incident thereto.

(c) Loss and injury sustained by said joint employees shall be borne by the parties jointly and equally except when caused by the negligence of the sole employees of one

of the parties, independently or in concurrence with the negligence of said joint employees, in either of which events such party shall solely bear all such loss and injury.

(d) As respects loss and injury sustained by others than said joint employees, each party shall solely bear and indemnify the other party against all such loss and injury caused by the sole negligence of its sole employees or the concurring negligence of its sole employees and said joint employees.

(e) Loss and injury sustained by others than said joint employees and caused under circumstances other than hereinabove described shall be borne by the parties as follows: Each party shall solely bear all loss to its own property (not including track) and to property in its custody and all injury to its sole employees and to persons carried by it; loss to track and loss and injury sustained by persons not hereinbefore described shall be borne by the parties jointly and equally.

7. The Grain Company shall not place, or permit to be placed, or to remain, any equipment, material, structure, pole or other obstruction within 8.5 feet, on straight track, or 9.5 feet on curved track, laterally of the center, or within 25 feet vertically from the top of the rail of said tracks. The number of feet of clearance herein specified may be changed by the Railway Companies at any time to meet new operating or legal requirements, by giving written notice thereof to the Grain Company. Within ten days after receipt of such notice the Grain Company shall, at its own expense, proceed to make such changes as may be necessary [fol. 45] to comply therewith. If the Grain Company shall fail to do so, the Railway Companies shall have the option to make such changes at the expense of the Grain Company or to terminate this agreement. The Grain Company shall observe and comply with all rules and regulations of the Railway Companies respecting the use and operation of said tracks and the loading or unloading of cars thereon.

8. The Grain Company shall not assign this agreement or any interest therein without the written consent of the Railway Companies. Subject to the foregoing limitation,

this agreement shall be binding upon the respective successors, lessees or assigns of the parties hereto.

9. The terms of this agreement represent the intention of the parties as of July 1, 1940, and the rights and obligations of the respective parties arising subsequent to such date and prior to the date of execution hereof shall be determined in accordance with the terms of this agreement. Following execution this agreement shall remain in full force and effect until cancelled by one of the parties hereto giving thirty (30) days' notice in writing to each of the other parties hereto of its intention so to cancel.

10. Effective upon the execution hereof contract entered into between the Railway Companies pertaining to said
70-496 (70-496)
tracks and dated February 11, 1928, is hereby terminated and cancelled.

11. This instrument is executed by, and shall be binding upon, Charles M. Thomson, not as an individual, but solely as Trustee of the property of Chicago and North Western Railway Company under authority of the Court in certain proceedings under Section 77 of the Bankruptcy Act in the District Court of the United States for the Northern District of Illinois, Eastern Division, entitled "In the Matter of Chicago and North Western Railway Company, Debtor" Docket No. 60448.

12. The Chicago, Rock Island and Pacific Railway Company is now in process of reorganization pursuant to Section 77 of the Bankruptcy Act under jurisdiction of the [fol. 46] United States District Court for the Northern District of Illinois, Eastern Division, and Frank O. Lowden, James E. Gorman and Joseph B. Fleming have been appointed Trustees of its property by said Court. The said Trustees or their successors in ownership or control of said property, or The Chicago, Rock Island and Pacific Railway Company, or its successor, in the event such bankruptcy proceeding shall be closed by final decree therein during the period this contract is in force, shall have the right to elect to terminate this agreement, such election to

be evidenced by a thirty (30) day written notice given to the other party or parties to this contract not later than ninety (90) days following such date of entry of final decree.

In Witness Whereof, the parties hereto have caused this agreement to be executed the day and year first above written.

(Duly executed by all parties named)

[fol. 47] Exhibit B

Adoption Agreement

This Agreement, made and entered into as of this first day of June, A. D., 1945, by and between Chicago and North Western Railway Company, Joseph B. Fleming and Aaron Colnon, as Trustees of the Estate of the The Chicago, Rock Island and Pacific Railway Company, and not as individuals, Chicago, Burlington and Quincy Railroad Company (hereinafter collectively referred to as the "Railway Companies") and J. L. Welsh, Helen V. Welsh, Dudley O. Aller and H. B. Waller, co-partners doing business as the Butler-Welsh Grain Company (hereinafter referred to as the "Grain Company"),

Witnesseth:

Whereas, under date of December 15, 1941, an agreement in writing was entered into between Charles M. Thomson, Trustee of the property of Chicago and North Western Railway Company, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, Chicago, Burlington and Quincy Railroad Company and J. L. Welsh, Helen V. Welsh and Dudley O. Aller, co-partners doing business as the Butler-Welsh Grain Company, relative to the ownership, operation and maintenance of a certain system of side tracks at Council Bluffs, Iowa, as more particularly described in said agreement which by reference is hereby made a part hereof; and,

[fol. 48] Whereas, Chicago and North Western Railway Company a corporation of the State of Wisconsin, has succeeded to all right, title and interest in and to the property of Chicago and North Western Railway Company administered by Charles M. Thomson as Trustee, Joseph B. Fleming and Aaron Colnon are now the successor Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, and the co-partnership of J. L. Welsh, Helen V. Welsh and Dudley O. Aller has been succeeded by a new co-partnership composed of J. L. Welsh, Helen V. Welsh, Dudley O. Aller and H. B. Waller, doing business as Butler-Welsh Grain Company; and,

Whereas, said new co-partnership is desirous of taking over and continuing in force and effect subject to all of its terms and conditions said agreement dated December 15, 1941, and the Railway Companies are willing to permit and assent to such transfer of interest:

Now, Therefore, the Railway Companies and the Grain Company, successors in interest as aforesaid, do hereby mutually adopt and agree to be bound by each and all of the terms, covenants and conditions of said agreement dated December 15, 1941, in all respects as if the Railway Companies and the Grain Company had originally entered into said agreement as the parties, respectively, thereto.

[fol. 49] In Witness Whereof, the undersigned parties have executed this agreement as of the day and year first above written.

(Duly executed by all parties named)

[fol. 50] (Exhibit C)

Supplemental Agreement

This Supplemental Agreement, made and entered into as of this 2nd day of January, A.D. 1948, by and between Chicago and North Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company (hereinafter collectively referred to as the "Railway Companies") and J. L. Welsh,

Helen V. Welsh, D. O. Aller, H. B. Waller, B. F. Butler and J. L. Welsh, Jr., co-partners doing business under the name of Butler-Welsh Grain Company (hereinafter referred to as the "Grain Company"),

Witnesseth:

Whereas, under date of December 15, 1941, an agreement in writing was entered into between Charles M. Thomson, Trustee of the property of Chicago and North Western Railway Company, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company and J. L. Welsh, Helen V. Welsh and D. O. Aller, co-partners doing business as the Butler-Welsh Grain Company, relative to the ownership, operation and maintenance of a certain system of side tracks at Council Bluffs, Iowa, as more particularly described in said agreement which by reference is hereby made a part hereof; and

Whereas, under date of June 1, 1945, said agreement of December 15, 1941, was amended by the parties thereto; and

Whereas, Chicago and North Western Railway Company, a corporation of the State of Wisconsin, has succeeded to all right, title and interest in and to the property of Chicago and North Western Railway Company administered by Charles M. Thomson, as Trustee; Chicago, Rock Island and Pacific Railroad Company, a Delaware corporation, has succeeded to all right, title and interest in and to the property of The Chicago, Rock Island and Pacific Rail- [fol. 51] way Company administered by Frank O. Lowden, Joseph B. Fleming and Aaron Colnon, as Trustees, and their successors, and the co-partnership doing business under the firm name of Butler-Welsh Grain Company has been succeeded by a new co-partnership consisting of J. L. Welsh, Helen V. Welsh, D. O. Aller, H. B. Waller, B. F. Butler and J. L. Welsh, Jr.; and

Whereas, said new co-partnership is desirous of taking over and continuing in force and effect, subject to all of

its terms and conditions, said agreement dated December 15, 1941, and the Railway Companies are willing to permit and assent to such transfer of interest;

Now, Therefore, the Railway Companies and the Grain Company, successors in interest as aforesaid, do hereby mutually adopt and agree to be bound by each and all of the terms, convenants and conditions of said agreement dated December 15, 1941, in all respects as if the Railway Companies and the Grain Company had originally entered into said agreement as the parties, respectively, thereto.

In Witness Whereof, the undersigned parties have executed this agreement as of the day and year first above written.

(Duly executed by all parties named)

[fol. 52] Answer of Defendant Chicago, Rock Island and Pacific Railroad Company to Cross-Claim of Defendant Chicago and Northwestern Railway Company, and Cross-Claim of Chicago, Rock Island and Pacific Railroad Company Against Chicago and Northwestern Railway Company.

(Filed U. S. District Court, September 8, 1955.)

[fol. 53] Comes Now defendant Chicago, Rock Island & Pacific Railroad Company and for answer to cross-claim of defendant Chicago & Northwestern Railway Company, against it, states and shows the court as follows:

Division I.

1. This defendant admits the allegations of paragraphs 1, 2, 3, 4, 8 and 9 of Count I of the Cross-Claim of Chicago & Northwestern Railway Company.

2. This defendant admits that Chicago, Rock Island & Pacific Car No. 145287 was in Council Bluffs, Iowa on February 7, 1953 and, on said date was inspected by one Bert Neumann who found the car suitable for grain loading and made a record to that effect.

This defendant denies each, all and every allegation contained in Paragraph 5 in Count I in the cross-claim of Chicago Northwestern Railway Company except those hereinbefore admitted.

[fol. 54] 3. This defendant admits that on February 9, 1953 its car RI 145287 at about 5:00 A. M. on said date was set out on a track connected to the so-called River track by a switch crew of Chicago, Rock Island & Pacific Railroad Company, and that said track is jointly owned by the three railroads above referred to and is the point at which cars were customarily set out by this defendant for movement to industries served by the River track, including the elevator of Kansas Grain Company. This defendant is without information and knowledge as to the exact time that car RI145287 was taken from the connecting track and spotted at the elevator track of Kansas Grain Company but admits that same was done some time prior to the morning of February 10, 1953, and that spotting was performed by the Chicago & Northwestern Railway Company.

This defendant denies each, all and every allegation set forth in paragraph 6, Count I of the Cross-Claim of Chicago & Northwestern Railway Company except those hereinbefore admitted.

4. This defendant admits that its employees made an inspection of car RI145287 on February 7, 1953 as set forth in the Answer to paragraph 5 of the Cross-Claim of Defendant Chicago & Northwestern Railway Company, and denies each, all and every allegation in Paragraph 7 of said cross-claim except those hereinbefore admitted.

5. This defendant denies each, all and every allegation set forth in Paragraph 10 of Count I of the cross-claim of defendant Chicago & Northwestern Railway Company and [fol. 55] this defendant denies that it was under any duty or obligation of any kind or character towards plaintiff with respect to car RI 145287 and alleges that it at no time assumed the position of a common carrier toward Kansas Grain Company with respect to said car. That Kansas Grain Company bills said car out over the line of

Union Pacific Railroad Company and Union Pacific Railroad Company owed, assumed and was under duty to furnish a car reasonably safe for loading of grain and that this defendant was under no duty with respect thereto.

6. This defendant admits that if plaintiff was injured as alleged in his complaint it was solely caused and contributed to by his own fault and negligence, but this defendant denies each, all and every allegation in paragraph 11 of Count I of the cross-claim of defendant Chicago & Northwestern Railway Company, except those hereinbefore admitted.

7. This defendant denies, each, all and every allegation set forth in Paragraph 12 of Count I of the cross-claim of defendant Chicago & Northwestern Railway Company and alleges that between the two defendants, Chicago & Northwestern Railway Company and Chicago Rock Island & Pacific Railroad Company, the primary responsibility for said injuries, which may have been sustained by plaintiff, rests upon defendant Chicago & Northwestern Railway Company or upon Union Pacific Railroad Company.

[fol. 56] Division II.

For answer to Count II of the cross-claim of defendant Chicago & Northwestern Railway Company, defendant Chicago, Rock Island & Pacific Railroad Company states and shows the court as follows:

1. This defendant incorporates herein, by reference, with the same force and effect as if again fully set out, paragraphs 1 to 7, inclusive, of its answer to Count I of the cross-claim of defendant Chicago & Northwestern Railway Company.

2. This defendant admits that on or about the 15th day of December, 1941, a written agreement was entered into between Charles M. Thomson, Trustee of the property of Chicago & Northwestern Railway Company, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island & Pacific Railroad Company and Chicago, Burlington & Quincy Rail-

road Company, and that a true copy of said instrument is attached to the cross-claim of defendant Chicago & Northwestern Railway Company. Defendant denies each, all and every allegation of paragraph 2 of Count II of the cross-claim of defendant Chicago & Northwestern Railway Company except those hereinbefore admitted and except as the allegations of said paragraph are otherwise answered her nafter.

3. This defendant admits that as of January 2, 1948, further supplemental agreement was entered into between defendant Chicago, Rock Island & Pacific Railroad Company and Chicago & Northwestern Railway Company and Chicago, Burlington & Quincy Railroad Company, with [fol. 57] other parties named in the instrument, and that a true copy of said so-called adoption agreement is attached to the cross-claim of defendant Chicago & Northwestern Railway Company. Defendant denies each, all and every allegation contained in paragraph 3 of Count II of the cross-claim of defendant Chicago & Northwestern Railway Company, except those expressly herein admitted.

This defendant alleges that the agreements entered into in the contracts in 1941 and 1948 were contracts between the railroad companies and the operators of the elevator; that said elevator was purchased by Kansas Grain Company and that Kansas Grain Company has never adopted and is not now bound by the terms of said agreements and that said agreements are not, therefor, presently binding as between the railroad companies, parties thereto.

4. Defendant denies each, all and every allegation set forth in paragraph 4 of Count II of the cross-claim of defendant Chicago & Northwestern Railway Company.

5. This defendant denies each, all and every allegation set forth in paragraph 5 of Count II of the cross-claim of defendant Chicago & Northwestern Railway Company.

6. Further answering Count II of the cross-claim of defendant Chicago & Northwestern Railway Company, this defendant alleges that if the alleged contract of December 15, referred to in cross-claim of defendant Chicago &

Northwestern Railway Company, is still effective then. [fol. 58] and in that event, under the provisions of Sub-division "e" of paragraph 6 of said contract, if the parties to said contract are held liable for the injuries sustained by plaintiff, then the loss and damage to be suffered is to be borne equally between parties to the contract and that plaintiff's injury claim is within the scope of Sub-division "e", paragraph 6, of the contract of December, 1941.

Division III.

For cross-claim against the defendant Chicago & Northwestern Railway Company this defendant states and shows the court as follows:

1. This defendant is a corporation organized under the laws of the state of Delaware. Defendant Chicago & Northwestern Railway Company is a corporation organized under the laws of the state of Wisconsin and the controversy herein involves more than $3000 exclusive of interest and costs and controversy herein is wholly between citizens of different states. Plaintiff is a resident and citizen of the state of Iowa and defendant Union Pacific Railroad Company is a corporation organized under the laws of the state of Utah. That each of the railway companies above referred to is qualified to do business in the state of Iowa as a common carrier of passengers and freight and each maintains and operates lines of railroad in Pottawattamie County, Iowa.

[fol. 59] 2. That Chicago & Northwestern Railway Company owns a side track or industry track laid in a public street of the city of Council Bluffs known as First Avenue, under grant from said city and there are numerous sidings connected to such track serving individual industries located on or adjacent to such track. The track is known and referred to as the "River Track". By contract defendant Chicago, Rock Island and Pacific Railroad Company and Chicago, Burlington & Quincy Railroad Company have acquired the right to [operated] over and upon the sidings connected with the River track to the same extent as the Chicago & Northwestern Railway

Company itself, and all industries located on or adjacent to the River track and connected thereto are considered, by all railroads, to be located on the lines of the three railroad companies above referred to. By agreement Chicago & Northwestern Railway Company performs all switching of cars originating at or destined to industries connected with the River track.

3. One of the industries connected with the River track at a point near Thirtieth Street and First Avenue in the city of Council Bluffs is a grain elevator owned by Kansas Grain Company. On or about January 28, 1953 Kansas Grain Company placed with this defendant an order for certain empty box cars for grain loading. On February 9, 1953 the car order above referred to not then being completely filled, this defendant set out car RI 145287 on the track connecting this defendant's line of railroad with the River track and said car with others was marked or [fol. 60] designated to be set for loading to the elevator of Kansas Grain Company, above referred to. On February 9 or 10, 1953, said car RI 145287 was taken by Chicago & Northwestern Railway Company and was set out and spotted adjacent to the elevator of the Kansas Grain Company. On February 10, 1953, car RI 145287 was loaded with shelled corn by employees of Kansas Grain Company including the plaintiff herein and on said date plaintiff alleges he received the injuries complained of in the complaint while working on or about said car which was still located at or adjacent to the elevator of Kansas Grain Company.

4. Plaintiff charges this defendant with certain specifications of negligence with respect to car RI 145287 and seeks recovery of $107,712.55 with interest thereon and costs on account of injuries claimed to have been sustained by plaintiff while attempting to close the door on said car RI 145287.

5. While car RI 145287 was spotted at the elevator of Kansas Grain Company and in the physical possession of said company, said company loaded it with shelled corn which it desired to ship to Denver, Colorado over the line of Union Pacific Railroad Company. Kansas Grain Com-

pany caused car RI 145287 to be loaded with shelled corn and prepared, executed and delivered to defendant Union Pacific Railroad Company a bill of lading covering the transportation of said car from the Kansas Grain Company elevator in Council Bluffs, Iowa to Denver, Colo- [fol. 61] rado. Union Pacific Railroad Company signed the bill of lading for shipment of said car on February 11, 1953 and accepted the car in the condition in which it then was and became responsible for the car during the period that it was being loaded for shipment. Neither this defendant nor defendant Chicago & Northwestern Railway Company was under any duty toward plaintiff with respect to the condition of car RI 145287 after the same was taken by the grain company for loading with grain for shipment on the line of Union Pacific Railway Company. By agreement between Chicago & Northwestern Railway Company, Chicago, Burlington & Quincy Railroad Company and Chicago, Rock Island & Pacific Railroad Company, dated November 21, 1910, which is still in full force and effect, it was provided as follows:

"Fourth: All employees engaged in the switching operations herein provided for, shall whenever so engaged, be deemed the joint employees of the parties hereto. Each party hereto assumes and agrees to pay all loss of and damage to its own property, and to persons and to property carried by it, or exclusively employed and controlled by it, caused by the switching operations herein provided for, unless such loss or damage be solely caused by the negligence of one or more of the other parties hereto, its or their officers, agents, servants or employees, in which case all such loss or damage shall be paid by the party or parties responsible for such negligence. If any such loss or damage shall be caused or contributed to by the fault or negligence of any of the officers, agents, servants or employees of two or more of the parties hereto, [fol. 62] each such party assumes and agrees to pay an equal amount of all loss or damage resulting directly or indirectly therefrom. If the parties cannot agree upon the cause of any such loss or damage or the casual contribution thereto, such cause or casual contribution shall be determined by arbitration, each party interested to appoint one of its operating officers, and if the number so appointed

shall be an even number, those appointed shall choose an additional disinterested railroad operating officer; and the written decision of the tribunal so constituted, signed by a majority of the members thereof, shall determine the controversy and such determination shall be a part of this contract, and shall be final and conclusive upon the parties. All loss, damage or injury to persons or property other than that above mentioned, caused by said switching operations, shall be treated as a part of the cost of said switching to be borne by the parties hereto as provided in Paragraph Second hereof. The term "loss and damage" shall include costs and disbursements relating thereto. Amounts paid by either party hereto upon judgments in actions brought against such party to recover any such loss or damage, shall be settled by the parties hereto in accordance with the above agreement, notwithstanding the judgment. Amounts paid by either party hereto in settlement of any claim made against such party on account of any such loss or damage, shall be settled by the parties hereto in accordance with the above agreement, provided that neither party hereto shall pay or settle any such claim without giving to the other party an opportunity to assume the settlement or defense thereof."

[fol. 63] 6. While subsequent agreements were entered into between the railway companies and the Butler Welsh Grain Company they were terminated by the sale by this defendant of its elevator property and the contract of November 21, 1910 was the contract in force and effect at the time the plaintiff's injury was susained on February 11, 1953. Under the terms of the foregoing contract if a liability be established against Chicago & Northwestern Railway Company or against this defendant same constitutes "loss, damage or injury to persons or property caused by said switching operations" and as such is to be equally divided between Chicago & Northwestern Railway Company, Chicago, Burlington & Quincy Railroad Company and Chicago, Rock Island & Pacific Railroad Company. If plaintiff's injury does not come within the provision last above referred to then the liability for same is to be borne in accordance with the provisions of the contract of November 21, 1910, by which the parties participating assume and agree to pay an equal amount on loss or

damage resulting directly or indirectly from the negligence of any party.

Wherefore, defendant Chicago, Rock Island & Pacific Railroad Company prays that in the event that any liability be established against either this defendant or Chicago & Northwestern Railway Company, the court adjudicate, declare and determine the rights of the respective defendants as between themselves and thereupon determine that any liability established by or against either this defendant or Chicago & Northwestern Railway Company constitutes a part of the cost of the switching operation on or over the River Track and is to be borne and shared equally by the [fol. 64] three parties to the contract of November 21, 1910, or in the alternative that the court find, declare and determine that the primary liability, therefore, is upon Union Pacific Railroad Company, and that upon payment of any judgment or any part thereof which may be rendered against this defendant or defendant Chicago & Northwestern Railway Company, either or both of said defendants shall be entitled to judgment over against Union Pacific Railroad Company.

[fol. 65] Cross-Claim of Defendant Chicago, Rock Island and Pacific Railroad Company Against Defendant Union Pacific Railroad Company.

(Filed U. S. District Court, September 8, 1955.)

[fol. 66] Comes Now defendant Chicago, Rock Island & Pacific Railroad Company and for its answer to cross-claim against Union Pacific Railroad Company states and shows the court as follows:

1. That this defendant is a corporation organized and existing under the laws of the state of Delaware. That defendant, Union Pacific Railroad Company, is a corporation organized and existing under the laws of the state of Utah. That both defendants have qualified to do business in the state of Iowa and that each maintains and operates lines of railroad in Pottawattamie County, Iowa. Plaintiff is a citizen of the state of Iowa and resides in Council Bluffs in said state.

2. Chicago & Northwestern Railway Company owns a certain track in the city of Council Bluffs which, under the terms of a grant from the city council of said city, has [fol. 67] been laid in one of the streets known as First Avenue. First Avenue extends substantially east and west from a point near Thirteenth Street, in the city of Council Bluffs, Iowa, to a point near the easterly side of the Missouri River. Side tracks serving individual industrial plants and industries have been constructed and connected to the track laid in First Avenue. The track laid in First Avenue and all of its sidings and appurtenances is locally known and referred to as the River track. Chicago, Burlington & Quincy Railroad Company and Chicago, Rock Island & Pacific Railroad Company have, by contract with the Chicago & Northwestern Railway Company, acquired rights and privileges of operation over said track and industries located thereon are considered as located on the lines of the three railroad companies above referred to. Chicago & Northwestern Railway Company performs switching service on said River track under certain contractual arrangements between the three railroad companies last above referred to.

3. One of the industries located adjacent to and served by the River track located in First Avenue is the elevator of the Kansas Grain Company which has been constructed on the northerly side of First Avenue and which extends for a distance of approximately 500 feet on either side of or near Thirtieth Street in the city of Council Bluffs. The River track is included within what is known as the Omaha, Nebraska-Council Bluffs, Iowa reciprocal switching district and all rail carriers having lines of railroad entering [fol. 68] the cities of Council Bluffs, Iowa and Omaha, Nebraska provide transportation service by railroad between industries located on any line of any railroad within the reciprocal district and other points in the United States and Canada, and all railroads issue bills of lading for freight carload shipments originating at any industry located on side tracks of any railroad company within the reciprocal switching district destined to any point on its line of railroad or which can be reached by connecting lines of railroad. If a car originates on a side track or industry track served by a railroad other than the railroad

issuing the bill of lading then the car is switched from the industry track or siding by the railroad owning or serving that track to the tracks of the railroad issuing the bill of lading to a point of interchange where the tracks of the two railroad connect. This service from the point at which the shipment originates to the line of railroad which has issued the bill of lading is commonly called a switching service or "Switch movement". The rail line performing the switch movement makes a charge for its service which is published in tariffs filed with state or federal commissions. This switch charge is not added to the charges of the railroad issuing the bill of lading but is assumed or "absorbed" by that line, subject to certain minimum net charges to be received by the railroad performing the transportation service. In performing such switch movement the rail line serving the industry or point of origin of the shipment acts as the agent for the lines of railroad issuing the bill of lading and is paid for such service by the railroad which issued the bill of lading. As applied [fol. 69] to the facts of this particular case the Kansas Grain Company is considered an industry on the lines of the Chicago & Northwestern Railway Company, Chicago, Rock Island & Pacific Railroad Company and Chicago, Burlington & Quincy Railroad Company. Other railroad lines which serve Council Bluffs and Omaha, such as Union Pacific, Missouri Pacific or Chicago, Milwaukee, St. Paul & Pacific, on request will execute bills of lading from the elevator of Kansas Grain Company in Council Bluffs to any point in the United States or Canada and the loaded cars are then moved from the elevator of Kansas Grain Company to a point of connection with the line which has executed billing and such switching service is paid for or absorbed by the carrier executing the billing which is called the "line-haul" carrier.

4. Kansas Grain Company, on or about January 28, 1953, placed with this defendant an order for grain cars for outbound loading from its elevator on First Avenue in the city of Council Bluffs. This defendant, shortly thereafter, had in its possession its car bearing the designation RI 145287 which was suitable for grain loading and on or about February 9, 1953 this defendant set out said car with two others on the track connecting its railroad with the

River track. Said cars were marked or designated for spotting at the elevator of Kansas Grain Company. Said cars were, on or about February 9, 1953, taken from the connecting track above referred to and were set out or spotted for grain loading at the elevator of Kansas Grain Company above referred to.

[fol. 70] 5. In loading cars for outbound movement with grain it was the accepted custom and practice of the Kansas Grain Company, which practice was known to defendant Chicago & Northwestern Railway Company and Union Pacific Railroad Company as well as to this defendant, to load cars if convenient so that the railroad line from which a car had been received on order would receive the outbound billing for the movement of such car. In many instances, because of the position of the cars, this practice could not be strictly adhered to and in those cases it was the custom and practice of the Kansas Grain Company to load cars for outbound movement and to bill them out to destination over any line of railroad and to give the railroad line from which cars had been ordered an equal number of loaded cars which had been received from other sources by the elevator company. Such custom and practice was well known to all defendants and was acquiesced in by them. All railroad lines serving the city of Council Bluffs and Omaha executed bills of lading covering loaded cars when so requested by Kansas Grain Company without regard to whether it had made the car available to Kansas Grain Company or had ha . an opportunity to inspect the same. It was the custom and practice of Kansas Grain Company, which fact was known to all railroad lines serving the Omaha-Council Bluffs territory, not to tender bills of lading to any specific line of railroad until the loading of the car had been completed and the grain therein contained had been sampled and graded by the Omaha Grain Exchange at Omaha, Nebraska.

[fol. 71] 6. On February 10, 1953, the employees of Kansas Grain Company, then having physical possession of car RI 145287 loaded the car with shelled corn for the purpose of filling an order or effecting a sale to Houlton Grain Company of Denver, Colorado. While plaintiff, W. E. Williams, was working about said car and endeavoring to

close one of the doors thereon, in some manner the north door of said car fell upon and injured said plaintiff for which injuries he seeks recovery of damages in the present action. At the time of plaintiff's injuries the car had been loaded with grain and samples therefrom for grading by the Omaha Grain Exchange had been taken from the car. After the grading of the samples and on the following morning the office of Kansas Grain Company in Omaha, Nebraska, prepared and tendered to Union Pacific Railroad Company at Omaha, Nebraska, a form of bill of lading by which the car was to be shipped via the line of Union Pacific Railroad Company from the elevator of Kansas Grain Company at Council Bluffs, Iowa to the Kansas Grain Company at Denver, Colorado, notify Hopkon Grain Company. About 10:45 A. M. on February 11, 1953, defendant Union Pacific Railroad Company, executed the bill of lading, accepting the car for shipment over its line of railroad and thereby accepted and became responsible for the condition of car RI 145287 from the time that the same was spotted for grain loading at the elevator of Kansas Grain Company. By accepting the billing of said car over its own line of railroad Union Pacific Railroad Company necessarily accepted responsibility for the condition of said car to the same extent as though it had fur-
[fol. 72] nished or made available said car for loading in response to an order placed with it by Kansas Grain Company.

7. On February 11, 1953, Kansas Grain Company advised the joint checker, employed by the three railroads operating on the River track, that car RI 145287 was ready for outbound movement and that the routing thereon was—"RI-UP". This defendant was specified in the routing only as a switching line which would perform the switch movement between the elevator of Kansas Grain Company in Council Bluffs and the nearest point at which delivery might be made to Union Pacific Railroad Company. In connection with such movement under applicable tariffs this defendant, acting as the agent or employee of Union Pacific Railroad Company and for its service in performing such movement, would normally have received a switch

charge of $4.86 from Union Pacific Railroad Company. By reason of the fact that the door on the northerly side of car RI 145287 had fallen off and that repairs thereto were required, under the American Association of Railroads Car Interchange Rules, defendant took physical possession of the car and made the necessary repair thereto by rehanging the door. During the time that the car was in the physical possession of this defendant it was at all times acting as the agent of Union Pacific Railroad Company and the contents of the car were at the risk of Union Pacific Railroad Company. During the times that the car was being loaded and transported between the elevator of [fol. 73] Kansas Grain Company and the tracks of Union Pacific Railroad Company, Union Pacific Railroad Company, under the so-called perdiem rules or agreements, would normally pay to this defendant a perdiem charge for the use of a freight car owned by this defendant.

8. Union Pacific Railroad Company transported the car from Council Bluffs, Iowa to Denver, Colorado and received therefor a tariff charge in excess of $200, but this defendant did not participate in, nor receive any compensation for any service performed by it and was not paid the usual switching charge by Union Pacific Railroad Company.

9. With respect to car RI 145287, this defendant, at no time, occupied the position of a common carrier to Kansas Grain Company or its employees and was under no duty or obligation with respect to Kansas Grain Company or its employees as to the safety of the car, its condition or otherwise. Under the facts hereinbefore set forth Union Pacific Railroad Company was and is primarily liable to plaintiff and primarily responsible for the condition of the car and this defendant was under no duty or obligation with respect thereto.

Wherefore, defendant, Chicago, Rock Island & Pacific Railroad Company prays that it have the following relief as against its co-defendant Union Pacific Railroad Company, to-wit:

1. That this court find, determine and adjudicate that as between defendant Chicago, Rock Island & Pacific Railroad Company and defendant Union Pacific Railroad Company, Union Pacific Railroad Company is primarily liable [fol. 74] to plaintiff and that this defendant is in no manner liable for plaintiff's injuries; in the event that any liability is imposed on this defendant that the court find, determine and adjudicate that the primary liability therefore rests upon defendant Union Pacific Railroad Company and not upon this defendant.

2. That if any judgment be rendered against this defendant in favor of the plaintiff in this action that the court find determine and adjudicate that on payment thereof that this defendant is entitled to judgment over, against defendant Union Pacific Railroad Company together with any costs, interest or other damages which may be paid by this defendant including reasonable attorneys fees for the cost of defending in this action.

[fol. 75] Order of District Court on Second Pre-Trial Conference.

(Filed U. S. District Court, September 9, 1955.)

[fol. 76] This Court having ordered the attorneys for the parties in the above cause to appear before it for pretrial conference as permitted by Rule 16 of the Federal Rules of Civil Procedure, and the attorneys having appeared and a conference having been had on this 8th day of September, 1955, at Des Moines, Iowa, and stipulations and agreements having been made between the parties concerning certain phases of the case, and the Court being fully advised in respect thereof, now finds that the following order should be entered herein:

It is Ordered by the Court that the subsequent course of the above entitled action shall be controlled by the following, unless modified by the Court to prevent manifest injustice:

[fol. 77] 1. At the opening of this conference the defendant Chicago, Rock Island and Pacific Railroad Company has filed its answer to the cross-claim of the defendant Chicago and Northwestern Railway Company and its cross-claim against the latter, answer to which cross-claim the defendant Chicago and Northwestern Railway Company may make on or before September 19, 1955; also, its cross-claim against defendant Union Pacific Railroad Company, which the latter may have 5 days to answer.

2. The defendant Union Pacific Railroad Company has indicated its intention to file an amended answer and cross-claim against the remaining two co-defendants, and 5 days from and after this date is granted for that purpose, and each of the defendants shall make answer thereto on or before September 19, 1955.

It is the purpose to have all pleadings as between the defendants completed on or before September 19, 1955. It is requested that counsel for each party will furnish to counsel for each other party copies of any pleadings in his or its behalf.

3. It is agreed that counsel for the defendant Chicago, Rock Island and Pacific Railroad Company will furnish to counsel for the plaintiff a copy of the report of Dr. Limbert as to his examination of the plaintiff.

4. It is agreed among counsel for all parties that the plaintiff, following the occurrence of the injury described in his complaint, was treated at and was confined to the Jennie Edmonson Memorial Hospital in Council Bluffs, Iowa, from February 10, 1953, until April 23, 1953, and that during such time a fair and reasonable charge for room and general care for 72 days at $9.50 per day, was a total of $684.00; that during the course of his hospitalization plaintiff was under surgery in the operating room of the hospital on more than one occasion, and a fair and reasonable charge for such services was $37.50; that a charge was made by the hospital for anesthesia in the amount of $25.00, which it is agreed is a fair and reasonable charge; that drugs and supplies in the amount of $50.05 were furnished to plaintiff, and that same is a fair

and reasonable charge for such drugs and supplies; and [fol. 78] in addition thereto, penicillin and intravenous solutions were furnished, for which a charge of $48.00 was made for penicillin and $8.00 for intravenous solutions, which it is agreed was the fair and reasonable charge therefor; and surgical dressings of $7.45 and surgical supplies of $30.95, which it is agreed are fair and reasonable charges therefor; X-ray examinations in the amount of $57.50 and routine laboratory examination $7.00 and special laboratory examination $127.00, which it is agreed were the fair and reasonable charges for the services rendered. It is agreed that plaintiff W. E. Williams was again in the hospital between May 25, 1953, and May 27, 1953, and that for use of the operating room, X-rays, dressings, laboratory, and board and room, a charge of $59.50 was made, which it is agreed was the fair and reasonable charge for such services; that on June 30, 1953, plaintiff was in the hospital for X-ray examination, for which a charge of $7.50 was made, which it is agreed is the fair and reasonable charge; and on July 31, 1953, X-ray examination $7.50 and operating room charge of $2.00 were made, which it is agreed are the fair and reasonable charges therefor. It is further stipulated and agreed that if Dr. Edwin M. Limbert of Council Bluffs, Iowa, were called as a witness he would testify that on or about February 17, 1953, he performed an open reduction of the left tibia and applied a body cast to plaintiff, and that his charge therefor in the amount of $300.00 is a fair and reasonable charge for the services rendered; and that office visits to his office were made by plaintiff on August 9 and September 28, 1953, for which a $2.00 charge for each office visit was made, or a total charge of $4.00, that there were 20 office visits, for which a charge of $3.00 each was made, or a total of $60.00, and on June 28 an office visit, for which a charge of $5.00 was made, all of which the witness would testify represented the fair and reasonable charge for his services. It is further stipulated if Dr. C. R. Brandt of Council Bluffs, Iowa, were called as a witness that he would testify that in the month of September, 1954, he extracted certain of plaintiff's teeth and made [fol. 79] upper and lower partial dentures, and that he made a charge of $140.00 for his services, which was paid on

October 27, 1954, and that same represented the fair and reasonable charges for the services. It is further stipulated that if Dr. Robert E. Jeranson, Council Bluffs, Iowa, were called as a witness he would testify that on February 26, 1953, to and including April 23, 1953, he was called in consultation with Doctors Limbert and Pester with respect to the plaintiff's case at the Jennie Edmonson Hospital, and that he made a charge of $125.00, which represents the fair and reasonable charge for the services rendered.

5. It is stipulated and agreed between the plaintiff and defendant Chicago, Rock Island and Pacific Railroad Company that if J. G. McAtee were called as a witness, he would testify that the records of the Flour Mills of America, Inc., show that William E. Williams, plaintiff in this case, was employed at the elevator known as the Kansas Grain Company elevator, which was a trade name for the elevator of Flour Mills of America, Inc., located at 30th and First Avenue in the City of Council Bluffs, Iowa, and that Mr. Williams was so employed from November 15, 1951, until February 10, 1953; that between February 10, 1953, until July 19, 1954, he was considered on a leave of absence; that he returned to the employ of the Flour Mills of America, Inc., on July 19, 1954, but after working 4 days, resigned; that the rate of pay for Mr. Williams for the 6 months prior to his injury on February 10, 1953, was $1.42 per hour, and that during the period between August 4, 1952, and February 16, 1953, the witness would testify that the wage record of W. E. Williams with the Flour Mills of America, Inc., was in accord with the statement which is submitted herewith as Exhibit "A". The defendants Chicago and Northwestern Railway Company and Union Pacific Railroad Company concur in the forgoing stipulation.

6. It is agreed among counsel for all parties that if plaintiff produces a plat of the area involved, an effort will be made to agree upon identification before trial.

7. Counsel for the defendants are unable to agree as [fol. 80] to the words to express what are the facts with reference to the order for the ultimate handling of the car which was loaded at Kansas Grain Company elevator and which is involved in this controversy. In the event plain-

tiff is required to call witnesses of the three defendants to make proof of these matters upon which counsel do not agree, and succeeds in making such proof, the court will allow to the plaintiff the cost thereof; together with a reasonable attorney fee therefor.

8. It is agreed between counsel that at the time of his injury on February 10, 1953, plaintiff was aged 58 years, and according to the Commissioners Standard Ordinary Mortality Table, as appears in the Code of Iowa 1954, had an expectation of life of 15.77 years.

9. Counsel for the defendant Chicago, Rock Island and Pacific Railroad Company has indicated intention to take the deposition, in Chicago, of one Thomas H. Smith, and will agree with counsel for the plaintiff as to the time and place of taking. This stipulation will constitute notice to counsel for other parties of the fact of taking, and the time and place will be indicated to them by counsel for the Chicago, Rock Island and Pacific Railroad Company and the plaintiff.

10. It is agreed that counsel for the three several defendants will stipulate as to contracts between them, or some of them, or all of them, that may be desired to be offered in evidence, and as to certain documents produced by counsel for the defendant Union Pacific Railroad Company before trial.

11. It is requested that counsel for all parties furnish to the court on or before September 30, 1955, their trial briefs upon which they rely, and if any specific instructions are to be requested, that they, too, be furnished, indicating thereon the authorities in support of any requested instruction. The trial briefs to be prepared in accordance with our Local Rules.

[fol. 81] Motion of Defendant Chicago and Northwestern Railway Company for Judgment on Pleadings or Summary Judgment.

(Filed in U. S. District Court, September 13, 1955.)

[fol. 82] Comes Now the defendant, Chicago and North Western Railway Company, the pleadings herein as between the plaintiff and this defendant having been closed, and moves the Court for a judgment on the pleadings in favor of this defendant herein upon the ground that upon the undisputed facts appearing from the pleadings this defendant is entitled to a judgment in its favor as a matter of law.

In the alternative this defendant moves upon the pleadings herein and upon all the records, files and proceedings in this cause for summary judgment in favor of this defendant on the ground that there is no genuine issue as to any material fact.

[fol. 83] Amendment to Answer of Defendant Chicago & North western Railway Company

(Filed U. S. District Court, pursuant to leave granted, September 13, 1955.)

[fol. 84] Comes now the defendant, Chicago and North Western Railway Company and amends its separate answer heretofore filed herein as follows:

1. This defendant amends Division I of its answer by striking therefrom paragraph 7 and substituting in lieu thereof the following:

"7. This defendant admits the allegations of paragraph 7 of the complaint."

2. This defendant amends Division I of its answer by striking therefrom paragraph 9 and substituting in lieu thereof the following:

"9. For answer to paragraph 9 of the complaint, this defendant admits that said carload of grain was subsequently and on or about the 24th day of February 1953 transported over the lines of the Union Pacific Railroad Company to Denver, Colorado."

[fol. 85] 3. This defendant amends Division I of its answer by striking therefrom paragraph 10 and substituting in lieu thereof the following:

"10. This defendant admits that on February 10, 1953 plaintiff, in the course of his employment by Kansas Grain Company, received injuries while endeavoring to close the door of Rock Island car No. 145287. This defendant denies the balance of the allegations of said paragraph 10."

[fol. 86] Amended Answer to Compiaint and Cross-Claims of Defendant Union Pacific Railroad Company Against Co-Defendants.

(Filed U. S. District Court, pursuant to leave granted, September 13, 1955.)

[fol. 87] Comes now the defendant Union Pacific Railroad Company and for its separate answer to the complaint of the plaintiff herein states:

Separate Answer to Count I of the Complaint

1. Answering paragraph 1, the defendant admits the allegations thereof.

2. Answering paragraph 2, the defendant admits the allegations thereof.

3. Answering paragraph 3, the defendant admits teh allegations thereof.

4. Answering paragraph 4, the defendant admits the allegations thereof.

5. Answering paragraph 5, the defendant admits the allegations thereof.

6. Answering paragraph 6, the defendant admits the allegations thereof.

7. Answering paragraph 7, this defendant alleges that on or abont the 9th day of February, 1953, the defendant Chicago, Rock Island and Pacific Railroad Company delivered a box car belonging to said Chicago, Rock Island and Pacific Railroad Company, to-wit, No. 145287, to the Chicago and North Western Railway Company for de-

livery to the Kansas Grain Company for the purpose of [fol. 88] being loaded with grain by such company. Defendant further alleges that on or about the 9th day of February, 1953, the said Chicago and North Western Railway Company did deliver the said car to the Kansas Grain Company for the purpose of being loaded with grain on the side track, or industry track, serving such grain company.

8. Answering paragraph 8, this defendant admits that the defendant Chicago and North Western Railway Company switched, spotted and placed the said Rock Island car No. 145287 on the track of the Kansas Grain Company for the use of said grain company, but alleges that it is informed and believes that the car referred to in said paragraph was so switched, spotted and placed on the track referred to on Feb. 9, 1953, rather than Feb. 10, 1953; defendant specifically denies that there is now or ever was at any time an agreement between defendants whereby defendant Chicago and North Western Railway Company does all the switching, spotting and placing of railroad cars on the side track of said Kansas Grain Company, and alleges that this defendant is not and never was at any time a party to any agreement whatsoever with the other defendants relative to the matters referred to in said paragraph.

9. Answering paragraph 9, defendant denies each and every allegation thereof and alleges that on Feb. 10, 1953, plaintiff W. E. Williams was an employee of Kansas Grain Company at the grain elevator owned by the grain company located at or near 30th Street and First Avenue in the City of Council Bluffs, Iowa. Said elevator is located upon and served by certain sidings which are connected to a track commonly referred to and designated as the River Track. [fol. 89] The River Track extends from a point near 13th Street in the City of Council Bluffs in a westerly direction to a point near the easterly side of the Missouri River, and numerous industries are located on or adjacent thereto, including the elevator owned by Kansas Grain Company above referred to. The sidings referred to above are located in Council Bluffs, Iowa, and said sidings are operated and maintained by Chicago and North Western Railway

Company, Chicago, Rock Island and Pacific Railroad Company, and Chicago Burlington and Quincy Railroad Company, and owned by Chicago and North Western Railway Company. Under agreements between the three last mentioned railroads, the Chicago and North Western Railway Company performs all switching on the said River Track and its sidings. Union Pacific Railroad Company was not, on Feb. 10, 1953, and never has been a party to any agreement concerning the so-called River Track or its sidings. On or about Jan. 28, 1953, Kansas Grain Company placed with the office of the local freight agent of the Chicago, Rock Island and Pacific Railroad Company at Omaha, Nebraska, an order for 35 empty box cars for loading with grain by Kansas Grain Company, which order was recorded in what is designated as the car order book in the office of the local agent of the Rock Island. It was the standard custom and practice of all railroads delivering cars for loading by the Kansas Grain Company to inspect such cars for defects and suitability for loading for grain prior to delivery by the railroad company for whom the cars were ordered. If [fol. 90] found free from defects and suitable for loading for grain, such cars were then carded by such railroad for such commodity. On Feb. 7, 1953, preliminary to complying with the aforementioned order, and in accordance with the said standard custom and practice, Chicago, Rock Island and Pacific Railroad Company undertook to make and did make an inspection of car No. RI 145287 (a car belonging to it and in its possession) for defects and suitability for loading for grain and okayed the car for grain and carded the same "OK for grain loading." Defendant further alleges that such inspection was not only a matter of custom and practice as heretofore alleged, but was also required by the A.A.R. Code of Rules hereinafter referred to in this paragraph, to which all defendants herein were subscribers. No further inspection or record of inspection was made by employees of Chicago, Rock Island and Pacific Railroad Company with respect to car RI 145287 prior to the injuries sustained by plaintiff Williams. On Feb. 9, 1953, car RI 145287, at approximately 5:00 AM, along with two other cars, was set out on the 17th Street connecting track to the River Track by a switch crew of Chicago, Rock Island and Pacific Railroad Company and de-

livered to Chicago and North Western Railway Company pursuant to the order of the Kansas Grain Company previously referred to. Said connecting track is owned by Chicago and North Western Railway Company and is the connection with the River Track hereinbefore referred to, at which cars are set out by Chicago, Rock Island and Pacific Railroad Company for movement to industries located on [fol. 91] the River Track, including the Kansas Grain Company, by the Chicago and North Western Railway Company. Thereafter on the 9th day of February, 1953, car RI 145287 was taken off of the 17th Street track by a switch crew of the Chicago and North Western Railway Company and by said crew set out at the elevator track of Kansas Grain Company. Car RI 145287 was loaded with shelled corn at the elevator of Kansas Grain Company on the afternoon of Feb. 10, 1953, by employees of said elevator company. After the car was loaded and in the afternoon of Feb. 10, 1953, a sample of the grain was taken from the car for the purpose of having it graded. Upon the sample being taken, the employees of the grain company started to close the door on said car, when the accident referred to in the complaint occurred at approximately 4:15 P.M., Feb. 10, 1953. After the accident and on the following day, that is, Feb. 11, 1953, the sample of grain was graded at the Omaha Grain Exchange in Omaha, Nebraska. Upon the completion of the grading on Feb. 11, 1953, the Kansas Grain Company's employees in Omaha, Nebraska, determined the destination and routing of said car and informed the grain company's employees at the elevator in Council Bluffs, Iowa, of the destination of and the routing of the car, telling them that its destination was The Houlton Grain Company at Denver, Colorado, and to be routed by way of the Chicago, Rock Island and Pacific Railroad Company and Union Pacific Railroad Company. On Feb. 11, 1953, a bill of lading for shipment of said car from Council Bluffs, Iowa, to Denver, Colorado, was prepared by employees of Kansas Grain Company at Omaha, [fol. 92] Nebraska, and received by Union Pacific Railroad Company on such date. On Feb. 11, 1953, car RI 145287 was inspected by representatives of Chicago, Rock Island and Pacific Railroad Company and Chicago and North Western Railway Company after said accident, be-

fore the said car was removed from Kansas Grain Company's elevator track, and the car was returned by the Chicago and North Western switch crew to the 17th Street connecting track and there set out. The car was taken by the Rock Island to the repair track of the Rock Island in the City of Council Bluffs, Iowa, and the door thereon was rehung without the car being unloaded or the shelled corn therein recoved. On Feb. 23, 1953, car RI 145287 was switched by a Rock Island switch crew to Union Pacific Railroad Company in Council Bluffs, Iowa. Pursuant to the 'Association of American Railroads Code of Rules Covering the Condition of and Repairs to Freight and Passenger Cars for the Interchange of Traffic", which Code of Rules has been adopted by all of the defendants herein, the said car was inspected by the said Union Pacific Railroad Company on Feb. 24, 1953, and was bad ordered at that time for worn brake heads and because a door was out of the top door track. Repairs were made, the cost thereof being charged to Chicago, Rock Island and Pacific Railroad Company. Repairs were completed Feb. 24, 1953, and thereupon Union Pacific Railroad Company transported the car to Denver, Colorado, over its own line of railroad. This defendant further alleges with respect to the particular shipment involved in this accident, that it did not have possession of such car prior to the accident or at the time of the accident or prior to Feb. 23, 1953, nor did it have an opportunity to inspect such car until Feb. 23, 1953, and did not accept said car and load until Feb. 24, 1953, on which date a waybill was issued for shipment [fol. 93] over its line; that Union Pacific Railroad Company was required under the provisions of the A.A.R. Code of Rules hereinbefore referred to, to accept said loaded car for transportation on its line after inspection of the same by it on Feb. 24, 1953; that such car and load was not transported over its line until on or after Feb. 24, 1953; that at no time did this defendant have notice or knowledge that there was to be any such shipment over its line until on and after Feb. 11, 1953, and after the time of said accident; that said accident did not occur on this defendant's line; that this defendant had no knowledge or notice that the accident referred to had occurred for almost

a year after it happened; this defendant denies that it at any time owed any duty or obligation whatsoever to the plaintiff.

10. Answering paragraph 10, this defendant admits that at about the hour of 4:20 PM on the 10th day of February, 1953, plaintiff, in the course of his employment by said Kansas Grain Company, was sent to the side track of said grain company to close the door on Chicago, Rock Island and Pacific Railroad Company car No. 145287 after it had been loaded. Further answering the allegations in said paragraph, this defendant specifically denies that plaintiff was injured by reason of any negligence or carelessness whatsoever on the part of this defendant either singly or in connection with the other defendants. With respect to the allegations of negligence and carelessness as alleged against the other defendants, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof. Relative to the remaining allegations in said paragraph, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 94] 11. Answering paragraph 11 and each and every subparagraph thereof, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

12. Answering paragraph 12 and each and every subparagraph thereof, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

13. Answering paragraph 13, this defendant denies each and every allegation of said paragraph and each and every allegation of each subparagraph thereof.

14. Answering paragraph 14, this defendant denies each and every allegation therein contained.

15. Answering paragraph 15, this defendant specifically denies that the proximate cause of the injuries and damage of which plaintiff complains was the negligence of this defendant either singly or in connection with the other de-

fendants, and alleges that this defendant was not negligent or careless in any manner whatsoever, and that no act of this defendant of any nature caused or contributed to cause the accident. As to the remaining allegations in such paragraph contained, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

16. Answering paragraph 16, this defendant specifically denies that the matters referred to therein were the result of any negligent act or any act whatsoever upon the part of this defendant, either singly or in connection with the other defendants. As to the remaining allegations in such paragraph contained, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 95] 17. Answering paragraph 17, this defendant specifically denies that the plaintiff's injuries resulting from such accident were the result of any negligence whatsoever upon the part of this defendant, either singly or in connection with the other defendants. Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations in said paragraph.

18. Further answering said complaint, this defendant denies that the plaintiff is entitled to recover the sum of $107,712.55 or any other amount from this defendant.

Separate Answer to Count II of the Complaint.

1. Answering paragraph 1 thereof, this defendant incorporates by reference paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of its answer to Count I of the complaint.

2. Answering paragraph 2, this defendant admits that at about the hour of 4:20 PM on the 10th day of February, 1953, plaintiff in the course of his employment by said Kansas Grain Company was sent to the side track of said grain company to close the door on the aforesaid car Rock Island No. 145287 after it had been loaded; defendant denies each and all of the remaining allegations in said paragraph contained.

3. Answering paragraph 3, this defendant incorporates by reference paragraphs 14, 15, 16 and 17 of its answer to Count I of the complaint.

4. Further answering said complaint, this defendant denies that the plaintiff is entitled to recover the sum of $107,712.55 or any other amount from this defendant.

[fol. 96] Wherefore, this defendant prays that the said complaint be dismissed as to it as to both Count I and Count II thereof and that it have and recover its costs herein.

Crossclaim.

For its crossclaim against the defendants Chicago, Rock Island and Pacific Railroad Company and Chicago and North Western Railway Company, defendant Union Pacific Railroad Company alleges as follows:

1. That plaintiff is a resident of the City of Council Bluffs, County of Pottawattamie, State of Iowa, and a citizen of the State of Iowa.

2. That defendant Chicago, Rock Island and Pacific Railroad Company is a corporation incorporated under the laws of the State of Delaware with its principal place of business in the City of Chicago, County of Cook, State of Illinois.

3. That defendant Chicago and North Western Railway Company is a corporation incorporated under the laws of the State of Wisconsin with its principal place of business in the City of Chicago, County of Cook, State of Illinois.

4. That defendant Union Pacific Railroad Company is a corporation incorporated under the laws of the State of Utah with its principal place of business in the City of Omaha, County of Douglas, State of Nebraska.

5. That on or about the 10th day of February, 1953, plaintiff was in the employ of Kansas Grain Company, at its grain elevator, located at Thirtieth Street and First Avenue in the City of Council Bluffs, County of Pottawattamie, State of Iowa.

[fol. 97] 6. All allegations contained in paragraph No. 9 of the foregoing amended answer are herein incorporated by reference.

7. This defendant specifically denies that it was in any way negligent or careless in any manner whatsoever, and alleges that no act of this defendant of any nature caused or contributed to cause the accident.

8. The plaintiff claims in the 10th paragraph of Count I of his complaint that about 4:30 PM on the 10th day of February, 1953, he received the injuries complained of while endeavoring to close the doors on Rock Island car No. 145287 after it had been loaded, and in the 13th paragraph of his complaint the plaintiff charges the Union Pacific Railroad Company with certain specific acts of negligence as therein set out. By reason thereof plaintiff seeks to recover from Union Pacific Railroad Company the sum of $107,712.55 with interest and costs for his alleged injuries.

9. Count II of the complaint incorporates the allegations of Count I except that it claims plaintiff's alleged injuries resulted from joint and concurrent negligence of the defendants.

10. As between the Chicago, Rock Island and Pacific Railroad Company, the Chicago and North Western Railway Company, and Union Pacific Railroad Company, the primary obligation and duty toward the plaintiff, with respect to the negligence charged in the complaint, rested upon the Chicago, Rock Island and Pacific Railroad Company or the Chicago and North Western Railway Company, or both of them, and if Union Pacific Railroad Company had any duty or obligation to the plaintiff, which Union Pacific Railroad Company specifically denies, such duties or obligation was secondary only.

11. If plaintiff was injured as alleged in the complaint, the said injuries were solely caused or contributed to by his own fault or negligence, or by the primary active and

[fol. 98] positive negligence of the Chicago, Rock Island and Pacific Railroad Company or the Chicago and North Western Railway Company either separately or jointly and concurrently, and one or both of said defendants in such event would be primarily liable for any injury or damage which may have been sustained or suffered by plaintiff herein.

12. If the Union Pacific Railroad Company is held liable to the plaintiff for all or a part of the loss or damage claimed by plaintiff, it will have been held liable only because of the primary active or positive negligence of the Chicago, Rock Island and Pacific Railroad Company or the Chicago and North Western Railway Company, either in their separate capacities or concurrently and jointly, and the said Chicago, Rock Island and Pacific Railroad Company or the Chicago and North Western Railway Company, or both of them will be liable to the Union Pacific Railroad Company to indemnify it for all such damage as it, the Union Pacific Railroad Company, may suffer and the said Union Pacific Railroad Company asserts in this crosselaim its right to such indemnity.

Wherefore, defendant Union Pacific Railroad Company demands judgment that if there is any liability to plaintiff, the defendant Chicago, Rock Island and Pacific Railroad Company or the defendant Chicago and North Western Railway Company, or both of them, be held to be solely liable to the plaintiff, and in the event a verdict is recovered against Union Pacific Railroad Company by plaintiff, that either the Chicago, Rock Island and Pacific Railroad Company or the Chicago and North Western Railway Company, or both of them, be held to be primarily liable, and that Union Pacific Railroad Company have judgment over and against the defendants Chicago, Rock Island and [fol. 99] Pacific Railroad Company or the Chicago and North Western Railway Company, or both of them, as the evidence may warrant, together with reasonable attorney's fees, expenses and costs herein.

[fol. 101] Cross-Claim of Defendant Chicago and Northwestern Railway Company Against Defendant Union Pacific Railroad Company.

(Filed U. S. District Court, pursuant to leave granted, September 14, 1955.)

[fol. 102] Comes Now the defendant Chicago and North Western Railway Company and, for its cross-claim against the defendant Union Pacific Railroad Company, states:

1. That the Chicago and North Western Railway Company is a corporation organized and existing under the laws of the State of Wisconsin; that the defendant Union Pacific Railroad Company is a corporation organized and existing under the laws of the State of Utah with its principal place of business in the City of Omaha, County of Douglas, State of Nebraska; that each of said railway companies is qualified to do business in the State of Iowa as a common carrier of freight and passengers for hire, each maintaining a line of railroad in Pottawattamie County, Iowa, and that the plaintiff herein is a resident of Council Bluffs, Pottawattamie County, Iowa.

2. That on or about the 10th day of February 1953 the plaintiff was in the employ of the Kansas Grain Company at its grain elevator located at 30th Street and First Avenue in the City of Council Bluffs, Iowa.

[fol. 103] 3. That the plaintiff claims in the 10th paragraph of Count I of his complaint that at about 4:30 P. M. on the 10th day of February 1953 he received the injuries complained of while endeavoring to close the doors of Rock Island car No. 145287 after it had been loaded, and in the 12th paragraph of Count I of his complaint the plaintiff charges the Chicago and North Western Railway Company with certain specific acts of negligence as therein set out and by reason thereof plaintiff seeks to recover from the Chicago and North Western Railway Company the sum of One Hundred Seven Thousand, Seven Hundred Twelve and 55/100 Dollars ($107,712.55) with interest and costs for his alleged injuries.

4. Count II of the complaint incorporates the allegations of Count I, except that it is claimed therein that plaintiff's alleged injuries resulted from the joint and concurrent negligence of the defendants.

5. As between the Chicago and North Western Railway Company and the Union Pacific Railroad Company the primary obligation and duty toward the plaintiff, with respect to the negligence charged in the complaint, rested upon the Union Pacific Railroad Company, and if Chicago and North Western Railway Company had any duty or obligation to the plaintiff, which is specifically denied by the Chicago and North Western Railway Company, such duty or obligation was secondary only.

6. That if plaintiff was injured as alleged in the complaint, the said injuries were solely caused or contributed to by his own fault or negligence, or by the primary, active and positive negligence of the Union Pacific Railroad Company, and said defendant in such event is primarily liable for any injury or damage which may have been sustained or suffered by the plaintiff herein.

[fol. 104] 7. If the Chicago and North Western Railway Company is held liable to the plaintiff for all or a part of the loss or damage claimed by the plaintiff, it will have been held liable only because of the primary active or positive negligence of the Union Pacific Railroad Company, and the said Union Pacific Railroad Company will be liable to the Chicago and North Western Railway Company to indemnify it for all such damage as it, the Chicago and North Western Railway Company, may suffer, and the said Chicago and North Western Railway Company asserts in this cross-claim its right to such indemnity.

Wherefore, defendant Chicago and North Western Railway Company demands judgment that if there is any liability to plaintiff, the defendant Union Pacific Railroad Company be held to be solely liable to the plaintiff, and in the event a verdict is recovered against Chicago and North Western Railway Company by plaintiff, that the Union Pacific Railroad Company be held to be primarily liable and that Chicago and North Western Railway Company

have judgment over and against the defendant Union Pacific Railroad Company for the amount recovered by the plaintiff against the Chicago and North Western Railway Company, together with reasonable attorney's fees, expenses and costs herein.

[fol. 105] Answer of Defendant Chicago and Northwestern Railway Company to Cross-Claim of Defendant Chicago, Rock Island and Pacific Railroad Company.

(Filed U. S. District Court, September 14, 1955.)

[fol. 106] Comes Now the defendant, Chicago and North Western Railway Company, and, for its answer to the cross-claim of the defendant, Chicago, Rock Island and Pacific Railroad Company, states:

1. This defendant admits the allegations of paragraphs 1, 2, 3 and 4 of the cross-claim of the Chicago, Rock Island and Pacific Railroad Company.

2. For answer to paragraph 5 of the cross-claim, this defendant admits that on or about the 21st day of November 1910 an agreement was entered into between the Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company and Chicago, Rock Island & Pacific Railroad Company, and that the defendant Chicago, Rock Island and Pacific Railroad Company has set out a true copy of the Fourth paragraph of said agreement in paragraph 5 of its cross-claim. This defendant further admits that it owed no duty towards the plaintiff with respect to the condition of car RI 145287, either before or after the same was taken by the grain company for loading with grain, and this defendant admits that while car RI 145287 was spotted at the elevator of the Kan-
[fol. 107] sas Grain Company and in the physical possession of said company, said company loaded it with shelled corn and executed and delivered to the defendant Union Pacific Railroad Company a bill of lading covering the transportation of said car from the Kansas Grain Company elevator in Council Bluffs, Iowa to Denver, Colorado, and

said Union Pacific Railroad Company signed the bill of lading for shipment of said car on February 11, 1953. As to the balance of the allegations of said paragraph, this defendant asserts them to be opinions and conclusions, both of fact and law, of the cross-complainant and therefore denies same.

3. For answer to paragraph 6 of the cross-claim, this defendant denies that the agreements referred to in the cross-claim of this defendant against the Chicago, Rock Island and Pacific Railroad Company were terminated by the sale by Chicago, Rock Island and Pacific Railroad Company of its property, and denies that the liability, if any, of the Chicago, Rock Island and Pacific Railroad Company is the result of loss, damage or injury, which, by the terms of any of the agreements herein referred to, should be borne by any party other than the Chicago, Rock Island and Pacific Railroad Company.

Wherefore, having fully answered the cross-claim, the defendant Chicago and North Western Railway Company prays that the cross-claim be dismissed and that it have judgment for its costs.

[fol. 108] Answer of Defendant Chicago and Northwestern Railway Company to Cross-Claim of Defendant Union Pacific Railroad Company.

(Filed U. S. District Court, September 14, 1955.)

[fol. 109] Comes Now the defendant, Chicago and North Western Railway Company, and, for its separate answer to the cross-claim of the defendant, Union Pacific Railroad Company, states:

1. This defendant admits the allegations of paragraphs 1, 2, 3, 4 and 5 of the cross-claim.

2. For answer to paragraph 6 of the cross-claim, which incorporates paragraph 9 of the amended answer by reference, this defendant admits all of the allegations thereof, except the allegations therein contained that the car was

inspected by the Union Pacific Railroad Company on February 24, 1953, and was bad ordered at that time for worn brake heads and because a door was out of the top door track, and that repairs were made, the cost thereof being charged to the Chicago, Rock Island and Pacific Railroad Company. This defendant has no information as to these allegations of that paragraph and therefore cannot make answer to same.

3. This defendant denies the allegations of paragraph 7 of the cross-claim.

[fol. 110] 4. This defendant admits the allegations of paragraph 8 of the cross-claim.

5. This defendant admits the allegations of paragraph 9 of the cross-claim.

6. This defendant denies the allegations of paragraph 10 of the cross-claim.

7. This defendant admits that part of paragraph 11 of the cross-claim in which it is alleged that the plaintiff's injuries were solely caused or contributed to by his own fault or negligence, and denies the remainder of the allegations of paragraph 11 thereof.

8. This defendant denies that portion of the allegations of paragraph 12 of the cross-claim, in which it is alleged that if the Union Pacific Railroad Company is held liable to the plaintiff for all or a part of the loss or damage claimed by plaintiff it will have been held liable only because of the primary active or positive negligence of the Chicago and North Western Railway Company, either separately or concurrently with the Chicago, Rock Island and Pacific Railroad Company, and denies that it will be liable to the Union Pacific Railroad Company to indemnify it for all such damage as it, the Union Pacific Railroad Company, may suffer, and denies that the Union Pacific Railroad Company, as asserted in the cross-claim, has any right to indemnity in any degree from the defendant Chicago and North Western Railway Company.

Wherefore, having fully answered the cross-claim of the defendant, Union Pacific Railroad Company, the defendant, Chicago and North Western Railway Company, prays that the cross-claim of the Union Pacific Railroad Company be [fol. 111] dismissed as to it and that it have judgment for its costs.

[fol. 112] Answer of Defendant Union Pacific Railroad Company to Cross-Claim of Defendant Chicago, Rock Island and Pacific Railroad Company.

(Filed U. S. District Court, September 14, 1955.)

[fol. 113] Comes now defendant Union Pacific Railroad Company and for its answer to the crossclaim of Chicago, Rock Island and Pacific Railroad Company admits, denies and alleges as follows:

1. The crossclaim fails to state a claim against this defendant upon which relief can be granted.

2. Admits the allegations of paragraph 1.

3. Admits the allegations of paragraph 2.

4. Answering paragraph 3, this defendant admits the allegations therein contained, except that this defendant specifically denies the allegation "If a car originates on a side track or industry track served by a railroad other than the railroad issuing the bill of lading, then the car is switched from the industry track or siding by the railroad owning or serving that track to the tracks of the railroad issuing the bill of lading to a point of interchange where the tracks of the two railroads connect", and except that it specifically denies the allegation "In performing such switch movement, the rail line serving the industry or point of origin of the shipment acts as the agent for the lines of railroad issuing the bill of lading."

[fol. 114] 5. This defendant admits the allegations of paragraph 4 with the exception of the allegation to the effect that when car RI 145287 was in the possession of the

defendant Chicago, Rock Island and Pacific Railroad Company, that it was suitable for grain loading. In connection with this allegation, this defendant alleges that it does not have sufficient knowledge or information to form a belief as to the truth of such allegation.

6. Answering paragraph 5, this defendant admits that in loading cars for outbound movement with grain, it was the accepted custom and practice of the Kansas Grain Company, which practice was known to defendants Chicago and North Western Railway Company and Union Pacific Railroad Company, as well as to defendant Chicago, Rock Island and Pacific Railroad Company, to load cars so that the railroad line from which a car had been received on order would receive the outbound billing for the movement of such car, but denies that such loading practice was followed on the basis of convenience to the Kansas Grain Company. This defendant further denies the allegation that in many instances this practice could not be strictly adhered to, but admits that in some instances it was not followed and that in those cases it was the custom and practice to load cars for outbound movement and bill them out over any line of railroad and to give the railroad line from which the cars had been ordered an equal number of loaded cars which had been received from other sources. This defendant admits that all railroad lines serving the cities of Council Bluffs and Omaha executed bills of lading covering loaded cars when so requested by Kansas Grain Company without regard to whether it had made the car available to Kansas Grain Company or had had an opportunity to inspect the same, but alleges that no loaded car was ac-
[fol. 115] cepted by any such railroad for transportation over its line until after it had made the inspection referred to in paragraph 12 of this answer, and which in the instant case was made by this defendant on Feb. 24, 1953, and that all such railroads knew that the railroad furnishing such car for loading for grain to the Kansas Grain Company had the duty of inspecting such car, before setting the same out for switching to the Grain Company (as is more specifically alleged in connection with this accident in paragraph

12 hereof as having been made by the Chicago, Rock Island and Pacific Railroad Company) for defects and prior to the loading thereof (which included inspection of the doors and the mechanism thereof) and that such railroad would in fact undertake to make such inspection, assuming all responsibility in connection therewith, as in fact was done by the Chicago, Rock Island and Pacific Railroad Company in this case. It is further admitted that it was the custom and practice of Kansas Grain Company, which fact was known to all railroad lines serving the Omaha-Council Bluffs territory, not to tender bills of lading to any specific line of railroad until the loading of the car had been completed and the grain therein contained had been sampled and graded by the Omaha Grain Exchange at Omaha, Nebraska.

7. Answering paragraph 6, this defendant admits that on Feb. 10, 1953, the employees of Kansas Grain Company, then having physical possession of car RI 145287 loaded the car with shelled corn. While plaintiff W. E. Williams was working about said car and endeavoring to close one of the doors thereon, in some manner the north door of said car fell upon and injured said plaintiff, for which injuries he seeks recovery of damages in the present action. At the time of plaintiff's injuries the car had been loaded with grain and samples therefrom for grading by the Omaha Grain Exchange had been taken from the car. After the grading of the samples and on the following morning, [fol. 116] the office of Kansas Grain Company in Omaha, Nebraska, prepared and tendered to Union Pacific Railroad Company at Omaha, Nebraska, a form of bill of lading by which the car was to be shipped via the line of Union Pacific Railroad Company from the elevator of Kansas Grain Company at Council Bluffs, Iowa to the Kansas Grain Company at Denver, Colorado, notify Houlton Grain Company. This defendant admits executing the bill of lading at about 10:45 AM on Feb. 11, 1953, and denies each and all of the remaining allegations in said paragraph.

8. Answering paragraph 7, this defendant admits the allegation "On February 11, 1953, Kansas Grain Company advised the joint checker, employed by the three railroads

operating on the River Track, that car RI 145287 was ready for outbound movement and that the routing thereon was 'RI-UP'." This defendant denies each and all of the remaining allegations in said paragraph.

9. Answering paragraph 8, this defendant admits the allegation that this defendant transported the car from Council Bluffs, Iowa, to Denver, Colorado, and received therefor a tariff charge in excess of $200.00, and denies the remaining allegations in said paragraph. This defendant alleges that it received the established tariff charge for transporting the carload of shelled corn contained in car RI 145287 from Council Bluffs, Iowa, to Denver, Colorado, in the amount of $213.25. Chicago, Rock Island and Pacific Railroad Company on Feb. 11, 1953, included car RI 145287 in a list of cars for which a switching charge of $4.86 each was made, and Union Pacific Railroad Company eliminated said car from the statement since such car had not been delivered to it on said date, and therefore could not account for the car, and Chicago, Rock Island and Pacific Railroad Company made no further billing with respect to this item and has not been paid the amount of $4.86 so charged the Union Pacific Railroad Company.

10. Answering paragraph 9, this defendant denies each and every allegation in said paragraph contained.

[fol. 117] 11. This defendant further alleges that Kansas Grain Company during February, 1953, maintained an office in the City of Omaha, Nebraska. The usual custom and practice known and acquiesced in by all the railroads with respect to the loading of cars at the Kansas Grain Company elevator in Council Bluffs, Iowa, was substantially as follows: Whenever occasion arose for outbound shipments of grain to be made, officers or employees of Kansas Grain Company in Omaha, Nebraska, called the elevator foreman in Council Bluffs, Iowa, and would give instructions for the elevator employees to load cars, specifying the type of grain and the size of the cars to be loaded. The grain company employees at the elevator then would select a car and load it with the specified type and grade of grain, and samples would be taken for grading by inspectors of the Omaha Grain Exchange. As soon as the

sample of grain was taken as aforesaid, the car door would be closed by employees of Kansas Grain Company and the car sealed. After the grading of the car, the officers and employees of Kansas Grain Company in Omaha then would advise their elevator foreman in Council Bluffs, Iowa, by telephone of the destination to which the car was to be shipped and the railroad over which it would be routed. The destination and routing of a particular car were not determined until after the result of the grading was known. The result of the grading would not be known in any case until after the car door was closed and sealed. In selecting cars for outbound loading, the employees of Kansas Grain Company at the elevator would select the specific cars from the supply available. In selecting cars for loading, the elevator employees of the grain company would follow the practice of loading cars received on specific order for movement over the line of railroad furnishing the empty car, but in some instances such practice was not strictly followed. If, however, a railroad did not receive back the particular car or cars which it delivered to the grain company, it nevertheless would receive loads for transport over its own line equaling in number the number of cars which such delivering carrier had delivered.

[fol. 118] 12. Further answering, this defendant alleges that plaintiff W. E. Williams was an employee of Kansas Grain Company at the grain elevator owned by the grain company located at or near 20th Street and First Avenue in the City of Council Bluffs, Iowa. Said elevator is located upon and served by certain sidings which are connected to a track commonly referred to and designated as the River Track. The River Track extends from a point near 13th Street in the City of Council Bluffs in a westerly direction to a point near the easterly side of the Missouri River, and numerous industries are located on or adjacent thereto, including the elevator owned by Kansas Grain Company above referred to. The sidings referred to above are located in Council Bluffs, Iowa, and said sidings are operated and maintained by Chicago and North Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, and Chicago, Burlington and Quincy Railroad Company, and owned by Chicago and North Western Railroad

Company. Under agreements between the three last mentioned railroads, the Chicago and North Western Railway Company performs all switching on the said River Track and its sidings. Union Pacific Railroad Company was not, on Feb. 10, 1953, and never has been a party to any agreement concerning the so-called River Track or its sidings. On or about Jan. 28, 1953, Kansas Grain Company placed with the office of the local freight agent of the Chicago, Rock Island and Pacific Railroad Company at Omaha, Nebraska, an order for 35 empty box cars for loading with grain by Kansas Grain Company, which order was recorded in what is designated as the car order book in the office of the local agent of the Chicago, Rock Island and Pacific Railroad Company. It was the standard custom and practice of all railroads furnishing cars for loading by the Kansas Grain Company to inspect such cars for defects and suitability for loading for grain prior to delivery by the railroad company from whom the cars were ordered; such custom and practice was well known by the Chicago, Rock Island and Pacific Railroad Company and acquiesced in by them. If found free from defects and suitable for [fol. 119] loading for grain, such cars were then carded by such railroad for such commodity. On Feb. 7, 1953, preliminary to complying with the aforementioned order, and in accordance with the said standard custom and practice, Chicago, Rock Island and Pacific Railroad Company undertook to make and did make an inspection of car No. RI 145287 (a car belonging to it and in its possession) for defects and suitability for loading for grain and okayed the car for grain and carded the same "OK for grain loading". This defendant further alleges that such inspection was not only a matter of custom and practice as heretofore alleged, but was also required by the A.A.R. Code of Rules hereinafter referred to in this paragraph, to which all defendants herein were subscribers. No further inspection or record of inspection was made by employees of Chicago, Rock Island and Pacific Railroad Company with respect to car RI 145287 prior to the injuries sustained by plaintiff Williams. On Feb. 9, 1953, car RI 145287, at approximately 5:00 AM, along with two other cars, was set out

on the 17th Street connecting track to the River Track by a switch crew of Chicago, Rock Island and Pacific Railroad Company and delivered to Chicago and North Western Railway Company pursuant to the order of the Kansas Grain Company previously referred to. Said connecting track is owned by Chicago and North Western Railway Company and is the connection with the River Track hereinbefore referred to, at which cars are set out by Chicago, Rock Island and Pacific Railroad Company for movement to industries located on the River Track, including the Kansas Grain Company, by the Chicago and North Western Railway Company. Thereafter on the 9th day of February, 1953, car RI 145287 was taken off of the 17th Street track by a switch crew of the Chicago and North Western Railway Company and by said crew set out at the elevator track of Kansas Grain Company. Car RI 145287 was [fol. 120] loaded with shelled corn at the elevator of Kansas Grain Company on the afternoon of Feb. 10, 1953, by employees of said elevator company. After the car was loaded and in the afternoon of Feb. 10, 1953, a sample of the grain was taken from the car for the purpose of having it graded. Upon the sample being taken, the employees of the grain company started to close the door on said car, when the accident referred to in the complaint occurred at approximately 4:15 PM, Feb. 10, 1953. After the accident and on the following day, that is, Feb. 11, 1953, the sample of grain was graded at the Omaha Grain Exchange in Omaha, Nebraska. Upon the completion of the grading on Feb. 11, 1953, the Kansas Grain Company's employees in Omaha, Nebraska, determined the destination and routing of said car and informed the grain company's employees at the elevator in Council Bluffs, Iowa, of the destination of and the routing of the car, telling them that its destination was The Houlton Grain Company at Denver, Colorado, and to be routed by way of the Chicago, Rock Island and Pacific Railroad Company and Union Pacific Railroad Company. On Feb. 11, 1953, a bill of lading for shipment of said car from Council Bluffs, Iowa, to Denver, Colorado, was prepared by employees of Kansas Grain Company at Omaha, Nebraska, and received by Union Pa-

cific Railroad Company on such date. On Feb. 11, 1953, car RI 145287 was inspect d by representatives of Chicago, Rock Island and Pacific Railroad Company and Chicago and North Western Railway Company after said accident, before the said car was removed from Kansas Grain Company's elevator track, and the car was returned by the Chicago and North Western switch crew to the 17th Street connecting track and there set out. The car was taken by the Rock Island to the repair track of the Rock Island in the City of Council Bluffs, Iowa, and the door thereon was rehung without the car being unloaded or the shelled corn therein removed. On Feb. 23, 1953, car RI 145287 was switched by a Rock Island switch crew to Union Pacific Railroad Company in Council Bluffs, Iowa. Pursuant to the "Association of American Railroads Code of Rules [fol. 121] Covering the Condition of and Repairs to Freight and Passenger Cars for the Interchange of Traffic", which Code of Rules has been adopted by all of the defendants herein, and Car Service Rule 7, also adopted by all of the defendants herein, the said car was inspected by the said Union Pacific Railroad Company on Feb. 24, 1953, and was bad ordered at that time for worn brake heads and because a door was out of the top door track. Repairs were made, the cost thereof being charged to Chicago, Rock Island and Pacific Railroad Company. Repairs were completed Feb. 24, 1953, and thereupon Union Pacific Railroad Company transported the car to Denver, Colorado, over its own line of railroad. This defendant further alleges, with respect to the particular shipment involved in this accident, that it did not have possession of such car prior to the accident or at the time of the accident or prior to Feb. 23, 1953, nor did it have an opportunity to inspect such car until Feb. 23, 1953, and did not accept said car and load until Feb. 24, 1953, on which date a waybill was issued for shipment over its line; that Union Pacific Railroad Company was required, under the provisions of the A.A.R. Code of Rules hereinbefore referred to and Car Service Rule 7, to accept said loaded car for transportation on its line after inspection of the same by it on Feb. 24, 1953; that such car and load was not transported over its line

until on or after Feb. 24, 1953; that at no time did this defendant have notice or knowledge that there was to be any such shipment over its line until on and after Feb. 11, 1953, and after the time of said accident; that said accident did not occur on this defendant's line; that this defendant had no knowledge or notice that the accident referred to had occurred for almost a year after it happened; this defendant denies that it at any time owed any duty or obligation whatsoever to the plaintiff. This defendant further alleges that Kansas Grain Company could have routed such car and load over the Chicago, Rock Island and Pacific Railroad Company's lines or the Chicago, Burlington and Quincy Railroad Company's lines to Denver, Colorado.

[fol. 122] 13. This defendant further alleges that when Chicago, Rock Island and Pacific Railroad Company made the inspection referred to herein on Feb. 7, 1953, it did so knowing that the car was to be loaded with grain by employees of Kansas Grain Company and knowing that such employees would be required to close the door, and such inspection was made to ascertain, among other things, that such door could in fact be properly closed without danger of injury to such employees. It made such inspection knowing that the car might be routed over another railroad's lines, in which event it knew that such other railroad would not inspect such car or have an opportunity to do so prior to the loading and closing of the door and would not even know of the car's or load's existence until after such operations were performed. It knew that insofar as Kansas Grain Company and its employees were concerned, that they at all times relied on the inspection of the Chicago, Rock Island and Pacific Railroad Company for the safety of such employees, and it owed to such employees, including the plaintiff, the duty of using due care in connection with the furnishing and inspection of such car. Union Pacific Railroad Company at no time owed any duty or obligation whatsoever to the plaintiff. This defendant further alleges that at no time until after said accident was there any common carrier relationship with respect to such car insofar as this defendant was concerned.

Wherefore, this defendant prays that said Cross-claim be dismissed and renews the prayer of its Separate

Amended Answer and Crossclaims against the Chicago, Rock Island and Pacific Railroad Company and Chicago and North Western Railroad Company.

[fol. 123] Answer of Defendant Union Pacific Railroad Company to Cross-Claim of Defendant Chicago and Northwestern Railway Company.

(Filed U. S. District Court, September 19, 1955.)

[fol. 124] Comes now defendant Union Pacific Railroad Company and for its answer to the crossclaim of Chicago and North Western Railway Company against it, admits, denies and alleges as follows:

1. Admits the allegations of paragraph 1 of the cross-claim.

2. Admits the allegations of paragraph 2 of the cross-claim.

3. Admits the allegations of paragraph 3 of the cross-claim.

4. Admits the allegations of paragraph 4 of the cross-claim.

5. Answering paragraph 5 of the crossclaim, this defendant denies each and every allegation therein contained.

6. Answering paragraph 6 of the crossclaim, this defendant admits that part of said paragraph in which it is alleged that if plaintiff was injured as alleged in the complaint, said injuries were solely caused or contributed to by his own fault or negligence, and denies each and all of the remaining allegations in said paragraph.

7. Answering paragraph 7 of the crossclaim, this defendant denies each and every allegation therein contained.

8. This defendant further alleges that Kansas Grain Company during February, 1953, maintained an office in

[fol. 125] the City of Omaha, Nebraska. The usual custom and practice known and acquiesced in by all the railroads with respect to the loading of cars at the Kansas Grain Company elevator in Council Bluffs, Iowa, was substantially as follows: Whenever occasion arose for outbound shipments of grain to be made, officers or employees of Kansas Grain Company in Omaha, Nebraska, called the elevator foreman in Council Bluffs, Iowa, and would give instructions for the elevator employees to load cars, specifying the type of grain and the size of the cars to be loaded. The grain company employees at the elevator then would select a car and load it with the specified type and grade of grain, and samples would be taken for grading by inspectors of the Omaha Grain Exchange. As soon as the sample of grain was taken as aforesaid, the car door would be closed by employees of Kansas Grain Company and the car sealed. After the grading of the car, the officers and employees of Kansas Grain Company in Omaha then would advise their elevator foreman in Council Bluffs, Iowa, by telephone of the destination to which the car was to be shipped and the railroad over which it would be routed. The destination and routing of a particular car were not determined until after the result of the grading was known. The result of the grading would not be known in any case until after the car door was closed and sealed. In selecting cars for outbound loading, the employees of Kansas Grain Company at the elevator would select the specific cars from the supply available. In selecting cars for loading, the elevator employees of the grain company would follow the practice of loading cars received on specific order for movement over the line of railroad furnishing the empty car, but in some instances such practice was not strictly followed. If, however, a railroad did not receive back the particular car or cars which it delivered to the grain company, it nevertheless would receive loads for transport over its own line equaling in number the number of cars which such delivering carrier had delivered.

[fol. 126] 9. Further answering, this defendant alleges that plaintiff W. E. Williams was an employee of Kansas Grain Company at the grain elevator owned by the grain company located at or near 30th Street and First Avenue in the City of Council Bluffs, Iowa. Said elevator is located

upon and served by certain sidings which are connected to a track commonly referred to and designated as the River Track. The River Track extends from a point near 13th Street in the City of Council Bluffs in a westerly direction to a point near the easterly side of the Missouri River, and numerous industries are located on or adjacent thereto, including the elevator owned by Kansas Grain Company above referred to. The sidings referred to above are located in Council Bluffs, Iowa, and said sidings are operated and maintained by Chicago and North Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, and Chicago, Burlington and Quincy Railroad Company, and owned by Chicago and North Western Railway Company. Under agreements between the three last mentioned railroads, the Chicago and North Western Railway Company performs all switching on the said River Track and its sidings. Union Pacific Railroad Company was not, on Feb. 10, 1953, and never has been a party to any agreement concerning the so-called River Track or its sidings. On or about Jan. 28, 1953, Kansas Grain Company placed with the office of the local freight agent of the Chicago, Rock Island and Pacific Railroad Company at Omaha, Nebraska, an order for 35 empty box cars for loading with grain by Kansas Grain Company, which order was recorded in what is designated as the car order book in the office of the local agent of the Chicago, Rock Island and Pacific Railroad Company. It was the standard custom and practice of all railroads furnishing cars for loading by the Kansas Grain Company to inspect such cars for defects and suitability for loading for grain prior to delivery by the railroad company from whom the cars were ordered; such custom and practice was well known by the Chicago, Rock Island and Pacific Railroad Company and the Chicago and North [fol. 127] Western Railway Company and acquiesced in by them. If found free from defects and suitable for loading for grain, such cars were then carded by such railroad for such commodity. On Feb. 7, 1953, preliminary to complying with the aforementioned order, and in accordance with the said standard custom and practice, Chicago, Rock Island and Pacific Railroad Company undertook to make and did make an inspection of car RI 145287 (a car belonging to it and in its possession) for defects and suitability for loading for grain and okayed the car for grain

and carded the same "OK for grain loading". This defendant further alleges that such inspection was not only a matter of custom and practice as heretofore alleged, but was also required by the A.A.R. Code of Rules hereinafter referred to in this paragraph, to which all defendants herein were subscribers. No further inspection or record of inspection was made by employees of Chicago, Rock Island and Pacific Railroad Company with respect to car RI 145287 prior to the injuries sustained by plaintiff Williams. On Feb. 9, 1953, car RI 145287, at approximately 5:00 AM, along with two other cars, was set out on the 17th Street connecting track to the River Track by a switch crew of Chicago, Rock Island and Pacific Railroad Company and delivered to Chicago and North Western Railway Company pursuant to the order of the Kansas Grain Company previously referred to. Said connecting track is owned by Chicago and North Western Railway Company and is the connection with the River Track hereinbefore referred to, at which cars are set out by Chicago, Rock Island and Pacific Railroad Company for movement to industries located on the River Track, including the Kansas Grain Company, by the Chicago and North Western Railway Company. Thereafter on the 9th day of February, 1953, car RI 145287 was taken off of the 17th Street track by a switch crew of the Chicago and North Western Railway Company and by said crew set out at the elevator track of Kansas Grain Company. Car RI 145287 was loaded with [fol. 128] shelled corn at the elevator of Kansas Grain Company on the afternoon of Feb. 10, 1953, by employees of said elevator company. After the car was loaded and in the afternoon of Feb. 10, 1953, a sample of the grain was taken from the car for the purpose of having it graded. Upon the sample being taken, the employees of the grain company started to close the door on said car, when the accident referred to in the complaint occurred at approximately 4:15 PM., Feb. 10, 1953. After the accident and on the following day, that is, Feb. 11, 1953, the sample of grain was graded at the Omaha Grain Exchange in Omaha, Nebraska. Upon the completion of the grading on Feb. 11, 1953, the Kansas Grain Company's employees in Omaha, Nebraska, defermined the destination and routing of said car and informed the grain company's employees at the elevator in Council Bluffs, Iowa, of the destination of and

the routing of the car, telling them that its destination was The Houlton Grain Company at Denver, Colorado, and to be routed by way of the Chicago, Rock Island and Pacific Railroad Company and Union Pacific Railroad Company. On Feb. 11, 1953, a bill of lading for shipment of said car from Council Bluffs, Iowa, to Denver, Colorado, was prepared by employees of Kansas Grain Company at Omaha, Nebraska, and received by Union Pacific Railroad Company on such date. On Feb. 11, 1953, car RI 145287 was inspected by representatives of Chicago, Rock Island and Pacific Railroad Company and Chicago and North Western Railway Company after said accident, before the said car was removed from Kansas Grain Company's elevator track, and the car was returned by the Chicago and North Western switch crew to the 17th Street connecting track and there set out. The car was taken by the Rock Island to the repair track of the Rock Island in the City of Council Bluffs, Iowa, and the door thereon was rehung without the car being unloaded or the shelled corn therein removed. On Feb. 23, 1953, car RI 145287 was switched by a Rock Island switch crew to Union Pacific Railroad Company in Council Bluffs, Iowa. Pursuant to the "Association of American [fol. 129] Railroads Code of Rules Covering the Condition of and Repairs to Freight and Passenger Cars for the Interchange of Traffic", which Code of Rules has been adopted by all of the defendants herein, and Car Service Rule 7, also adopted by all of the defendants herein, the said car was inspected by the said Union Pacific Railroad Company on Feb. 24, 1953, and was bad ordered at that time for worn brake heads and because a door was out of the top door track. Repairs were made, the cost thereof being charged to Chicago, Rock Island and Pacific Railroad Company. Repairs were completed Feb. 24, 1953, and thereupon Union Pacific Railroad Company transported the car to Denver, Colorado, over its own line of railroad. This defendant further alleges, with respect to the particular shipment involved in this accident, that it did not have possession of such car prior to the accident or at the time of the accident or prior to Feb. 23, 1953, nor did it have an opportunity to inspect such car until Feb. 23, 1953, and did not accept said car and load until Feb. 24, 1953, on which date a waybill was issued for shipment over

its line; that Union Pacific Railroad Company was required, under the provisions of the A.A.R. Code of Rules hereinbefore referred to and Car Service Rule 7, to accept said loaded car for transportation on its line after inspection of the same by it on Feb. 24, 1953; that such car and load was not transported over its line until on or after Feb. 24, 1953; that at no time did this defendant have notice or knowledge that there was to be any such shipment over its line until on and after Feb. 11, 1953, and after the time of said accident; that said accident did not occur on this defendant's line; that this defendant had no knowledge or notice that the accident referred to had occurred for almost a year after it happened; this defendant denies that it at any time owed any duty or obligation whatsoever to the plaintiff. This defendant further alleges that Kansas Grain Company could have routed such car and load over the Chicago, Rock Island and Pacific Railroad Company's lines or the Chicago, Burlington and Quincy Railroad Company's lines to Denver, Colorado.

[fol. 130] 10. This defendant further alleges that when Chicago, Rock Island and Pacific Railroad Company made the inspection referred to herein on Feb. 7, 1953, it did so knowing that the car was to be loaded with grain by employees of Kansas Grain Company and knowing that such employees would be required to close the door, and such inspection was made to ascertain, among other things, that such door could in fact be properly closed without danger of injury to such employees. It made such inspection knowing that the car might be routed over another railroad's lines, in which event it knew that such other railroad would not inspect such car or have an opportunity to do so prior to the loading and closing of the door and would not even know of the car's or load's existence until after such operations were performed. It knew that insofar as Kansas Grain Company and its employees were concerned, that they at all times relied on the inspection of the Chicago, Rock Island and Pacific Company for the safety of such employees, and it owed to such employees, including the plaintiff, the duty of using due care in connection with the furnishing and inspection of such car; that Chicago and North Western Railroad Company, in switching and moving the said car over the River Track and in spotting the same

on the Kansas Grain Company's siding or industry track, also owed to the plaintiff the duty to use due care with respect to such car and the movement thereof. Union Pacific Railroad Company at no time owed any duty or obligation whatsoever to the plaintiff. This defendant further alleges that at no time until after said accident was there any common carrier relationship with respect to such car insofar as this defendant was concerned.

Wherefore, this defendant prays that said Crossclaim be dismissed and renews the prayer of its Separate Amended Answer and Crossclaims against the Chicago, Rock Island and Pacific Railroad Company and Chicago and North Western Railway Company.

[fol. 131] Answer of Defendant Chicago, Rock Island and Pacific Railroad Company to Cross-Claim of Defendant, Union Pacific Railroad Company.

(Filed U. S. District Court, September 20, 1955.)

[fol. 132] Defendant Chicago Rock Island & Pacific Railroad Company, for its answer to cross-claim of Union Pacific Railroad Company against it, states and shows the court as follows:

1. This defendant admits the allegations of paragraphs 1, 2, 3, 4 and 5 of said cross-claim.

2. In answer to paragraph 9 of the Answer of Union Pacific Railroad Company, which is incorporated by reference as paragraph 6 of the cross-claim of Union Pacific Railroad Company, this defendant admits that W. E. Williams, on February 10, 1953, was an employee of Kansas Grain Company at the grain elevator owned by such company, at or near 30th Street and First Avenue in the city of Council Bluffs, Iowa; admits that said elevator is located upon and served by certain sidings connected to a track commonly referred to and designated as the River Track; admits that the River Track extends from a point near 13th Street in the city of Council Bluffs in a westerly [fol. 133] direction to a point near the easterly side of the

Missouri River and that numerous industries are located on or adjacent thereto, including the elevator known as the Kansas Grain Company elevator; admits that the tracks and sidings are all located in Council Bluffs, Iowa, and that said sidings are owned and maintained by Chicago & Northwestern Railway Company. This defendant denies that Chicago, Rock Island & Pacific Railroad Company has any ownership of the River Track as such, but admits that by contract with Chicago & Northwestern Railway Company it has acquired that right to serve industries on or adjacent to the River Track, as industries on its own line of railroad. This defendant admits that under agreements between Chicago, Rock Island & Pacific Railroad Company, Chicago & Northwestern Railway Company and Chicago, Burlington & Quincy Railroad Company, the Northwestern Company performs all switching on the River Track and its sidings for the three railroads; admits that Union Pacific Railroad Company was not, on February 10, 1953, and never has been a party to such contracts, but alleges that Union Pacific Railroad Company, by tariffs duly filed, is a party to what is known as the Omaha-Council Bluffs reciprocal switching district. This defendant admits that on or about January 28, 1953, Kansas Grain Company placed an order or orders with the office of the local freight agent of Chicago, Rock Island and Pacific Railroad Company at Omaha, Nebraska, for thirty-five (35) empty box cars for loading with grain at the Kansas Grain Company elevator, and that said order [fol. 134] was recorded in the car order book in the office of the local agent of this defendant. This defendant admits that it was, in February, 1953, the custom and practice of railroads, making cars available for loading at the Kansas Grain Company elevator, to inspect such cars prior to spotting at the elevator and that if found suitable for grain loading it was the practice to attach a placard to each car reading "O.K. for grain loading". This defendant admits that on February 7, 1953, its inspector inspected car RI 145287, then in its possession, for suitability for loading of grain and that said car was carded with a placard reading as set forth above. This defendant denies that said inspection was made in connection with the aforementioned order for cars and alleges that said inspection was made as a routine inspection in the usual course of

defendant's business, such as was generally undertaken when a car was to be furnished to a particular industry for loading on the line of Chicago, Rock Island & Pacific Railroad Company. This defendant denies that such inspection was required by the A. A. R. Code of Rules and alleges that said Code of Rules relates only to interchange of cars as between railroads. This defendant admits that no further inspection was made by its employees with respect to car RI 145287 prior to the injuries sustained by plaintiff. This defendant admits that on February 9, 1953, at approximately 5:00 A. M., car RI 145287 was set out on a track at or near 17th Street connecting to the River Track; admits that said car was set by a switch crew of this defendant and was placed at said point so [fol. 135] that the car could be set by the Chicago & Northwestern Railway Company switch crew at the Kansas elevator. This defendant denies that said connecting track was or is owned by Chicago & Northwestern Railway Company, but admits that it is the point at which cars are set out by this defendant for movement to industries located on or adjacent to the River Track. This defendant admits that either on the 9th or 10th day of February, 1953, car RI 145287 was moved from the point at which it was left by the switch crew of this defendant by a switch crew of Chicago & Northwestern Railway Company and by said crew set out at the elevator track of Kansas Grain Company; admits that car RI 145287 was loaded with shelled corn at the Kansas elevator during the afternoon of February 10, 1953, by employees of said elevator company; admits that a sample of grain was taken from the car for the purpose of having it inspected and graded; admits that thereafter while employees of the grain company were working about a door on car RI 145287 and at approximately 4:15 to 4:30 P. M. on February 10, 1953, the injuries for which plaintiff seeks recovery, occurred. This defendant admits that the sample of grain taken from car RI 145287 was graded by inspectors of the Omaha Grain Exchange in Omaha, Nebraska, and that employees of Kansas Grain Company were advised of the results of the inspection and grading thereon on February 11, 1953. This defendant denies that the Kansas Grain Company employees in Omaha, Nebraska, determined the destination

and routing of said car on February 11, 1953, and alleges [fol. 136] that the destination of said car was determined prior thereto by employees of Kansas Grain Company's Omaha office when the elevator employees at Council Bluffs were directed to load said car. This defendant admits that on February 11, 1953, after the completion of the inspecting and grading of said car Kansas Grain Company employees at Omaha, Nebraska made up and issued a bill of lading on the standard form in which car RI 145287 was designated for shipment from Kansas Grain Company, Council Bluffs, Iowa, to Kansas Grain Company, Denver, Colorado, notify Houlton Grain Company, Denver, Colorado, over the line of Union Pacific Railroad Company. This defendant denies that Kansas Grain Company employees in Omaha, Nebraska, informed the grain company employees at the elevator in Council Bluffs, Iowa, of the destination and routing of the car and that same was to be routed by way of Chicago, Rock Island & Pacific Railroad and Union Pacific Railroad. This defendant admits that at about the time of the preparation of the bill of lading, or shortly thereafter, employees of the elevator in Council Bluffs, Iowa, were advised by the Omaha office of the grain company of the fact that car RI 145287 was routed via Union Pacific Railroad to Denver, Colorado. This defendant admits that on February 11, 1953, car RI 145287 was inspected by agents and representatives of Chicago, Rock Island & Pacific Railroad Company and Chicago & Northwestern Railway Company before said car was removed from the side track at the Kansas elevator; admits that the car was moved by Chicago & Northwestern Railway Company switch crew to a track at 25th Street and First Avenue in Council Bluffs, Iowa, and there set out; that the [fol. 137] track at 25th Street and First Avenue was the point at which Chicago & Northwestern Railway Company switch crews customarily set out cars to be further handled by this defendant. This defendant admits that car RI 145287 was moved by a switch crew of this defendant to its repair track in the city of Council Bluffs, Iowa, and the door thereon was rehung without the car being unloaded. This defendant admits that on February 23, 1953, car RI 145287 was switched by a switch crew of this defendant to

defendant Union Pacific Railroad Company at a point known as the pool yard in Council Bluffs, Iowa, which was the usual point at which cars moving under Union Pacific Billing from the line of this defendant were switched. This defendant is without information or knowledge with respect to what was revealed by the inspection of said car RI 145287 by inspectors of defendant Union Pacific Railroad Company, but admits that inspectors of that company made an inspection of said car. This defendant further objects to the allegations contained in said paragraph 9 with respect to the condition of the car on February 24, 1953, as immaterial, irrelevant and remote. This defendant admits that Union Pacific Railroad Company transported the car to Denver, Colorado, over its own line of railroad. This defendant denies that Union Pacific Railroad Company did not have possession of car RI 145287 on or prior to February 23, 1953; denies that it had no opportunity to inspect such car until February 23, 1953, and denies that Union Pacific Railroad Company did not [fol. 138] accept said car and load until February 24, 1953, and this defendant alleges that from and after the commencement of loading of car RI 145287 at the elevator in Council Bluffs, Iowa, the car was in the legal possession of Union Pacific Railroad Company. That by executing the bill of lading thereon at 10:45 A. M. on February 11, 1953, defendant Union Pacific Railroad Company retroactively accepted said car and became responsible to the plaintiff for its condition and that, at all times thereafter, while the car was being switched by defendant Chicago & Northwestern Railway Company or by this defendant, said car RI 145287 was legally in the possession, custody and control of Union Pacific Railroad Company, and this defendant was acting merely as the agent of Union Pacific Railroad Company in performing transportation service between the Kansas Grain Company elevator and Denver, Colorado. This defendant denies that Union Pacific Railroad Company was required, under the provisions of the A. A. R. Code of Rules, to accept said loaded car for transportation on February 24, 1953, because as a matter of law defendant Union Pacific Railroad Company accepted billing thereon on February 11, 1953. This defendant denies each, all and every allegation set forth in paragraph 9 of

the answer of Union Pacific Railroad Company except those hereinbefore expressly admitted.

3. This defendant for answer to paragraph 7 of the cross-claim of Union Pacific Railroad Company, alleges that said defendant became liable for the condition of the [fol. 139] car as a matter of law and became the carrier line which furnished the car to Kansas elevator for loading by virtue of its acceptance of billing and by virtue of the tariffs and the relations between defendants.

4. This defendant admits the allegations of paragraphs 8 and 9 of the cross-claim of Union Pacific Railroad Company, but alleges that Count II of plaintiff's complaint relies upon the rule of res ipsa loquitur; that the rule of res ipsa loquitur is inapplicable to this case and plaintiff's pleading thereof is inappropriate and improper.

5. This defendant denies the allegations and conclusions set forth in paragraph 10 of the cross-claim of Union Pacific Railroad Company and alleges that by acceptance of the billing on car RI 145287 defendant Union Pacific Railroad Company retroactively accepted the car and all legal consequences of furnishing the same; that if defendant Chicago, Rock Island & Pacific Railroad Company was under any duty or obligation to plaintiff in this action its duty was secondary to the duty owed plaintiff by Union Pacific Railroad Company.

6. This defendant denies each, all and every allegation and conclusion set forth in paragraph 11 of the cross-claim of Union Pacific Railroad Company and alleges that the primary duty toward plaintiff rested upon Union Pacific [fol. 140] Railroad Company and if there be any legal obligation or duty on this defendant to plaintiff, the liability of this defendant is secondary to that of Union Pacific Railroad Company.

7. This defendant denies, each, all and every allegation and conclusion set forth in the paragraph numbered 12 of the cross-claim of Union Pacific Railroad Company; alleges that Union Pacific Railroad Company was the only railroad company acting as a common carrier in the transac-

tion with Kansas Grain Company and the plaintiff; that the primary liability for the condition of car RI 145287 rested upon defendant Union Pacific Railroad Company and that this defendant is in no manner obligated to indemnify Union Pacific Railroad Company from loss or damage.

Wherefore, having fully answered the cross-claim of defendant Union Pacific Railroad Company, defendant Chicago, Rock Island & Pacific Railroad Company prays that all relief sought thereunder be denied to Union Pacific Railroad Company.

[fol. 141] Defendant Chicago, Rock Island and Pacific Railroad Company's Request for Admissions of Facts.

(Filed U. S. District Court, September 20, 1955.)

[fol. 142] To: Plaintiff William E. Williams and to Defendants Union Pacific Railroad Company and Chicago & Northwestern Railway Company.

Defendant Chicago, Rock Island & Pacific Railroad Company, under the provisions of Rule 36 of the Federal Rules of Civil Procedure, hereby serves upon you and each of you a request for the admission of the following specified facts, answer to be made as prescribed in Rule 36 of the Federal Rules of Civil Procedure within fifteen (15) days after the service of this request upon you. The specific facts as to which admissions are sought are as follows:

1. Flour Mills of America, Inc., now operates and at all times material, did operate a terminal grain elevator under the trade name and style of Kansas Grain Company at Thirtieth Street and First Avenue in the city of Council Bluffs, Iowa. This elevator is hereafter referred to in these requests as "Kansas elevator". Flour Mills of America, Inc., maintains an office in Omaha, Nebraska under the trade name of "Kansas Grain Company".

[fol. 143] 2. The Kansas Elevator, at all times material, had a storage capacity exceeding five million bushels of grain.

3. The Kansas Elevator continually received, shipped and stored large quantities of grain, practically all of which moved to or from the elevator in railroad box cars, over all major lines of railroads serving the Omaha and Council Bluffs area.

4. The Kansas Elevator is, and was located adjacent to, and at all times material has been served by a railroad industry track known as the "River Track", which was constructed in First Avenue, by authority of the city council of the city of Council Bluffs, many years ago by Chicago & Northwestern Railway Company.

5. Since about the year 1889 and continuing to the present time, Chicago, Rock Island & Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and Chicago & Northwestern Railway Company have served all industries on or adjacent to the River Track under contractual arrangements with Chicago & Northwestern Railway Company by which Chicago, Rock Island & Pacific Railroad Company and Chicago, Burlington & Quincy Railroad Company have acquired rights to operate and use the River Track, so that all industries located on or adjacent to the River Track, including the Kansas Elevator, are considered by all railroads in the Omaha, Council Bluffs area as industries located on the lines of the three railroad companies above referred to. The switching of cars on the River Track and the setting of same to the elevator and removal therefrom has, for many years, been done by crews and engines of Chicago & Northwestern Railway Company.

[fol. 144] 6. The Kansas elevator is within the area known and designated among railroad companies as the Omaha, Nebraska-Council Bluffs, Iowa reciprocal switching district.

7. All railroads serving the Omaha, Council Bluffs area, by tariffs duly filed, are parties to joint through rates between various points of origin and destination for shipments moving to, from or through the Kansas elevator, and, to the extent shown in the tariffs, through rates have been established from points of origin on shipments mov-

ing to the elevator, for storage, and from the elevator to destinations, with the privilege of storing the grain in transit at the elevator. Such rates are called "transit rates". The three defendants named in the caption hereof are parties to such tariffs.

8. The officers and employees of the Kansas elevator place orders with practically all railroad companies serving the Omaha-Council Bluffs area for empty cars for grain loading, and such empty cars reach the Kansas elevator by interchange between such other railroads, and one of the three railroads which serve the River Track. All cars are physically set or spotted at or adjacent to Kansas elevator by engines and crews of Chicago & Northwestern Railway Company.

9. In February, 1953, and prior thereto, it was the custom and practice for the officers and employees of the Kansas elevator to place orders for cars substantially in advance of the needs of the elevator for actual loading, [fol. 145] and empty cars were supplied, by the railroad with which the order was placed, as cars were available. On January 28 and January 29, 1953, officers and employees of the Kansas elevator placed orders with Chicago, Rock Island & Pacific Railroad Company for a total of thirty-five (35) cars for grain loading.

10. Prior to February 9, 1953, Chicago, Rock Island & Pacific Railroad Company had made available, on these orders, for loading at the Kansas elevator, fourteen cars.

11. On February 9, 1953, at approximately 5:00 A. M., a switch crew of Chicago, Rock Island & Pacific Railroad Company set out on the 17th Street connecting track to the River Track, at the customary place for cars moving to the Kansas elevator, three empty cars for grain loading. One of the three cars was a car owned by Chicago, Rock Island & Pacific Railroad Company and bearing the initials and numerals RI 145287. This car was inspected and found suitable for grain loading by an inspector employed by Chicago, Rock Island & Pacific Railroad Company on February 7, 1953, and a placard reading "O.K. for grain loading" was placed on the car at that time.

12. During the day or evening of February 9, 1953, a switch crew of Chicago & Northwestern Railway Company moved car RI 145287 from the 17th Street connecting track and set the same on a siding west o and at the Kansas elevator in the usual position where empty cars for loading at the elevator were set out by Chicago & Northwestern Railway Company.

[fol. 146] 13. During the afternoon of February 10, 1953, car RI 145287, together with one or more other cars, was loaded with grain by employees of Kansas elevator.

14. Cars were loaded at the Kansas elevator only upon directions from the Omaha office. No orders were given to load grain except in expectation of immediate outbound shipment, and to complete, or fill, specific contractual commitments, or orders, of the grain company.

15. The Usual custom and practice followed by employees of the Omaha office was to call the elevator by telephone and direct the loading of a specified number of bushels of wheat, corn, rye or oats and the grade of such grain. On some occasions it was the practice for the employees at the Omaha office of Kansas Grain Company to inform the elevator employees of the destination to which the car was to be shipped, but this was not always done. No employee of Kansas Grain Company now has any specific recollection of exactly what instructions were given the employees at the elevator with respect to loading cars on or about February 10, 1953, for shipment to Honlton Grain Company at Denver, Colorado.

16. On receipt of the directions specified in the foregoing request the elevator employees proceeded to load a sufficient number of cars to comply with the directions given. The elevator employees selected cars for loading from the available supply on hand at the elevator, including cars which had been consigned to the elevator, via various lines of railroad, and had been unloaded and made empty at the elevator.

[fol. 147] 17. Cars loaded with grain received inbound at the elevator and made empty there were considered as available for loading by the elevator employees and such

cars were loaded out as a matter of custom and practice and were generally billed out on the line of any railroad company, irrespective of the line of railroad from which the car had been received on inbound movement to the elevator.

18. Upon completion of the loading, the usual custom and practice of the elevator employees was to close the doors of the grain cars and place seals thereon, after samples were taken for inspection and grading by the Omaha Grain Exchange at Omaha, Nebraska.

19. Samples of the grain were taken from each car and sent by messenger to the Omaha Grain Exchange where they were carefully inspected and graded. The inspection and grading process took a period of approximately one-half day. Usually samples taken during the forenoon hours prior to 11:00 or 11:30 A. M. were inspected and graded during the afternoon of that day; while samples taken during the afternoon hours were customarily inspected and graded some time during the morning hours of the following day.

20. No bills of lading were made up by Kansas Grain Company or tendered to any railroad company for signature until the result of the inspection and grading was known to the office of Kansas Grain Company.

[fol. 148] 21. On the morning of February 11, 1953, the Omaha office of the grain company made up and tendered to a traffic representative of Union Pacific Railroad Company, shipper's order bill of lading, in form prescribed by classifications and tariffs of Western Railroads, for car RI 145287, for shipment from Kansas Grain Company (division of Flour Mills of America, Inc.) at Council Bluffs, Iowa, consigned to Kansas Grain Company, Denver, Colorado. Notify Houlton Grain Company, Denver, Colorado. A duplicate shipping order is now in the possession of Union Pacific Railroad Company and photostatic copy thereof has been furnished to counsel for Chicago, Rock Island & Pacific Railroad Company and Chicago & Northwestern Railway Company. Request is hereby made for

admission of the genuineness of that instrument, or in the alternative for the production of the original duplicate copy upon trial of this action.

22. At or about 10:45 A. M. on February 11, 1953, a traffic representative of Union Pacific Railroad Company signed said bill of lading on behalf of said defendant.

23. It was the custom and practice for the employees at the Omaha office of Kansas Grain Company to notify employees at Kansas elevator in Council Bluffs of the destination and routing of each car by telephone at the time of or shortly after bills of lading for particular cars were prepared. The employees at the Kansas elevator in Council [fol. 149] Bluffs customarily notified a yard checker employed by Chicago & Northwestern Railway Company to handle records of cars on the River Track of the destination of each car and the outbound routing of such car and it was customary, either that same day or within a few hours thereafter for the Kansas elevator employees in Council Bluffs to make up a so called switching order and deliver the same to the yard checker.

24. In this instance a switching order, including car RI 145287 along with certain others, was made up dated February 11, 1953 and delivered to the yard checker on or about February 11, 1953. Request is made for admission of the genuineness of said document on the form headed "Lathrop Grain Company".

25. Defendants Union Pacific Railroad Company, Chicago & Northwestern Railway Company and Chicago, Rock Island & Pacific Railroad Company were, in February, 1953, parties to the association of America Railroads Code of Rules governing the condition of and repairs to freight cars and for the interchange of traffic between railroads. All of said railroad companies had executed the so called freight car interchange rules agreement in conformity to the Code of Rules set forth above.

26. Following the occurrence of the injury to plaintiff, car RI 145287 was switched from the Kansas elevator by an engine and crew of Chicago & Northwestern Railway Company to the point at which cars were customarily re-

ceived by Chicago, Rock Island & Pacific Railroad Com-
[fol. 150] pany and said car was removed by a switch crew of Chicago, Rock Island & Pacific Railroad Company to a track known as the repair track in the yards of Chicago, Rock Island & Pacific Railroad Company, in the city of Council Bluffs, Iowa.

27. Car RI 145287 remained in the physical possession of Chicago, Rock Island & Pacific Railroad Company until February 23, 1953, at which time it was set out by a switch crew of Chicago, Rock Island & Pacific Railroad Company on a track in the so called pool yard in Council Bluffs, Iowa, at which Union Pacific Railroad Company customarily received cars in interchange from Chicago, Rock Island & Pacific Railroad Company.

26. Car RI 145287 was taken by a switch crew of Union Pacific Railroad Company from the pool yard referred to in the foregoing interrogatory shortly after midnight on February 24, 1953.

29. Union Pacific Railroad Company performed transportation service with its own engines and crews from the pool yard in Council Bluffs, Iowa, to Denver, Colorado, and received, therefore, the published tariff of $213.25 for the transportation of the car from the Kansas elevator in Council Bluffs, Iowa, to destination.

30. The tariffs of Chicago, Rock Island & Pacific Railroad Company for switching cars between industries located on the line of said railroad company and interchange tracks of other railroads at Council Bluffs, provided for a switching charge on February 9 to February 23, 1953, inclusive, of $4.86 per car.

[fol. 151] 31. Tariffs of Union Pacific Railroad Company relating to switching charges over connecting railroads at Council Bluffs, Iowa, provided on February 24, 1953, that Union Pacific Railroad Company would absorb switching charges of any railroad for movement of a car from an industry track upon such railroad to an interchange point with Union Pacific Railroad Company in Council Bluffs, Iowa, provided Union Pacific Railroad Company received certain minimum net charges for line-

haul service. The net revenues received by Union Pacific Railroad Company for movement of car RI 145287 from Council Bluffs, Iowa, to Denver, Colorado, substantially exceeded the minimum net charges specified in said Union Pacific Railroad Company tariff.

32. In the normal course of business, Union Pacific Railroad Company would have paid to Chicago, Rock Island & Pacific Railroad Company a switching charge of $4.86 for movement of car RI 145287 from Kansas elevator to the interchange track in the Council Bluff pool yard. Chicago, Rock Island & Pacific Railroad Company, on or about February 16, 1953, included car RI 145287 in a list with other cars for which such switch charge was being made but Union Pacific Railroad Company eliminated car RI 145287 from such statement and has never paid Chicago, Rock Island & Pacific Railroad Company anything for the movement of car RI 145287 in connection with the movement of said car to Denver, Colorado.

[fol. 152] 33. Chicago, Rock Island & Pacific Railroad Company made no charge and received no payment from Kansas Grain Company for car RI 145287 or for switching the car or performing any transportation service of said car, or its contents.

34. At all times material hereto, the three railroad companies, Union Pacific Railroad Company, Chicago & Northwestern Railway Company and Chicago, Rock Island & Pacific Railroad Company were parties to what is commonly called a perdiem agreement or established perdiem rules, by which agreement railroad companies joining therein agree to pay for the use of freight cars owned by other railroad companies while on the rails of, or held by, or for the account of, another railroad company. A standard current rate, in February, 1953, for the use of a box car suitable for grain loading, owned by one railroad and in the possession of, or transported by another railroad, was $2.00.

35. It was the general custom and practice among defendants and other railroads at Council Bluffs, Iowa, that in instances in which a car would be made available for loading at an industry and said car was loaded by the in-

dustry and billed out over the line of another railroad company, the company owning the car made what is called a perdiem reclaim against the railroad line on which the car was billed for shipment from the time that loading of said car was commenced at the industry billing the car out. In the instant case no perdiem reclaim charge was made [fol. 153] against Union Pacific Railroad Company for the use of car RI 145287 while being loaded by Kansas Grain Company or in the physical possession of Chicago, Rock Island & Pacific Railroad Company because under the perdiem rules or perdiem agreement said charge would have been cancelled by an equal charge for the number of days that car RI 145287 was held before the car was interchanged to Union Pacific Railroad Company.

36. Employees at Kansas elevator, in selecting cars for outbound shipment, endeavored so far as possible to load cars received on orders from a particular line of railroad for movement out over the same line of railroad, but where this was inconvenient to the elevator employees they frequently, to the knowledge of all defendants, would load out a car which had been ordered from one railroad over the line of another railroad. If, however, a railroad company did not receive back, under load, the particular car or cars which it had made available to the grain company for loading, the grain company never the less would give such railroad billing for loads for movements over its own line, equaling in number the number of cars which such railroad company had made available for loading. In cases in which an empty car received from one railroad was billed out loaded over the line of another railroad, the routing directions of Kansas Grain Company to the joint checker would specify that the switch movement from the elevator to the railroad over which the car was billed out was to be performed by the railroad from which the car had come to the [fol. 154] elevator. In the case of inbound cars unloaded and made empty at the elevator, which were later billed out, the grain company employees did not generally specify any particular railroad to perform the switching service from the elevator to the line of railroad accepting the bill of lading.

37. All defendants were, during the month of February, 1953, members of the Council Bluffs-Omaha and South Omaha Perdiem and Reclaim Association and at said time were operating under the Code of Reclaim Rules adopted by said association and revised May 1, 1950.

38. Car RI 145287 was inspected by Union Pacific Railroad Company on February 24, 1953.

39. Request is made for admission of the genuineness of the association of American Railroads Code of Rules governing the condition of and repairs to freight cars for interchange of traffic and supplement thereto, effective January 1, 1953, in published booklet form in December, 1952, published by Association of American Railroads, 59 E. Van Buren St., Chicago, Illinois.

[fol. 155] Plaintiff's Request for Admissions of Facts.

(Filed U. S. District Court, September 20, 1955.)

[fol. 156] Comes now plaintiff and pursuant to the provisions of Rule 36 of the Federal Rules of Civil Procedure hereby requests defendants within ten (10) days after service of this request to make the following admissions for the purpose of this action only.

1. That Flour Mills of America, Inc., now operates and at all times material to this cause, did operate a terminal grain elevator under the trade name and style of Kansas Grain Company at Thirtieth Street and First Avenue in the City of Council Bluffs, Iowa.

2. That practically all of the grain moved to or from the aforesaid grain elevator was moved in railroad box cars.

3. That all railroad box cars moved to or from said elevator are transported on a railroad industry track known as the "River Track".

4. That said "River Track" at all points adjacent to said elevator is owned by the Chicago and Northwestern Railway.

5. That said "River Track" extends from a point near Sixteenth Street in the City of Council Bluffs, Iowa, to a point near the easterly side of the Missouri River in said city, and lies to the south of said elevator. That said track runs generally east and west between said terminal points.

[fol. 157] 6. That all railroad box cars placed upon the spur track of said elevator for loading or unloading grain are so placed by Chicago and Northwestern Railway Company.

7. That officers and employees of said Kansas Grain Company periodically order empty railroad box cars for loading with grain at said elevator from the Chicago, Rock Island and Pacific Railroad Company.

8. That pursuant to an agreement between the Chicago, Rock Island and Pacific Railroad Company and the Chicago and Northwestern Railway Company, empty box cars ordered from the Chicago, Rock Island and Pacific Railroad Company for use by said elevator are placed on the railroad track commonly known as the "Seventeenth Street Connecting Track to the River Track" by the Chicago, Rock Island and Pacific Railroad Company and are moved to said elevator by the Chicago and Northwestern Railway.

9. That on January 28 and January 29, 1953, employees of said elevator placed orders with the Chicago, Rock Island and Pacific Railroad Company for a total of thirty-five railroad box cars for grain loading.

10. That on February 7, 1953, as a result of the orders placed on January 28, and January 29, 1953, Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 was inspected by one Bert Neumann, an employee of the Chicago, Rock Island and Pacific Railroad Company, who approved said car as being suitable for grain loading.

11. That no further inspection was made by any employee of the Chicago, Rock Island and Pacific Railroad Company of said railroad box car prior to the injuries claimed to have been sustained by the plaintiff herein.

12. That on February 9, 1953, at approximately 5:00 o'clock A. M., a switch crew of the Chicago, Rock Island and Pacific Railroad Company, in further pursuance of said orders of January 28 and January 29, placed said Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 on the aforementioned Seventeenth Street Connecting Track to the River Track.

13. That pursuant to the aforementioned agreement between the Chicago and Northwestern Railway Company [fol. 158] and the Chicago, Rock Island and Pacific Railroad Company, a switch crew of the Chicago and Northwestern Railway Company, between the hours of 6:30 o'clock P. M. and 11:15 o'clock P. M. on February 9, 1953 switched said box car to the spur track of said elevator and placed same in the usual position for empty cars west of the loading shed of said elevator.

14. That during the afternoon of February 10, 1953, said car was moved in an easterly direction into the loading shed of said elevator and was loaded with grain by employees of said elevator, including plaintiff herein.

15. That after said box car was loaded with grain it was moved to a position east of said loading shed.

16. That after being so placed a sample of grain was taken from the contents of said box car by one of the employees of said elevator.

17. That upon completion of the loading of a box car with grain and taking a sample of grain therefrom, the usual custom and practice of the elevator employees was to close the doors of the grain cars and place seals thereon.

18. That the plaintiff was injured while attempting to close the door on said Chicago, Rock Island and Pacific Railroad Company box car #RI 145287.

19. That the sample of grain taken from Chicago, Rock Island and Pacific Railroad Company box car. #RI 145287 was sent by messenger to the Omaha Grain Exchange on the afternoon of February 10, 1953, between the hours of 4:00 o'clock P. M. and 6:00 o'clock P. M.

20. That on the morning of February 11, 1953, the Omaha Grain Exchange notified the Omaha office of Kansas Grain Company that the grade and type of grain loaded on Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 was No. 2 Yellow Corn.

21. That on the morning of February 11, 1953, after receipt of notice of grade and type of grain loaded on Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 from Omaha Grain Exchange, employees of the Omaha office of the Kansas Grain Company made seven copies of Bill of Lading No. 4544 in which Kansas [fol. 159] Grain Company was designated as Consignor and Houlton Grain Company of Denver, Colorado was designated as Consignee covering the contents of Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 and delivered same to the Western Weighing and Inspection Bureau offices in the Omaha Grain Exchange.

22. That Western Weighing and Inspection Bureau authorized transit of said box car #RI 145287 to Houlton Grain Company of Denver, Colorado via Union Pacific Railroad Company and delivered original and one copy of said Bill of Lading No. 4544 to one R. A. Foral, General Agent of the Freight Department of the Union Pacific Railroad Company at or about 10:45 o'clock A. M. on February 11, 1953, and returned four copies of said Bill of Lading to the Omaha office of said Kansas Grain Company. That on February 11, 1953 at 11:00 o'clock A. M., employees of said Kansas Grain Company released Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 by delivering a Release Sheet to the Joint Checker employed by the Chicago and Northwestern Railway Company designating said car to be transported via Chicago, Rock Island and Pacific Railroad Company and Union Pacific Railroad Company.

23. That all defendants in this action were, at all times material to this cause, parties to the Association of American Railroads Code of Rules governing the condition of and repairs to freight cars and for the interchange of traffic between railroads and that all of said defendants had executed the so-called Freight Car Interchange Rules Agreement in conformity to said Code of Rules.

24. That after the release of Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 as hereinabove stated, a switch crew of the Chicago and Northwestern Railway Company removed said car from the spur track of the Kansas Grain Elevator to a point at which cars were customarily received by the Chicago, Rock Island and Pacific Railroad Company and said box car was removed by a switch crew of the Chicago, Rock Island and Pacific Railroad Company to a track known as the Repair Track in the yards of the Chicago, Rock Island and Pacific Railroad Company, in the City of Council Bluffs, Iowa.

25. That said Chicago, Rock Island and Pacific Rail- [fol. 160] road Company box car #RI 145287 remained in the physical possession of Chicago, Rock Island and Pacific Railroad Company until February 23, 1953, at which time said box car was switched by a switch crew of the Chicago, Rock Island and Pacific Railroad Company to the Union Pacific Railroad Company in Council Bluffs, Iowa.

26. That on February 24, 1953, said Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 was inspected by the said Union Pacific Railroad Company and was declared "Bad Ordered" at that time for worn brake heads and because a door was out of a top door track.

27. That the Union Pacific Railroad Company completed repairs to said box car #RI 145287 on February 24, 1953 and thereafter transported said car to Denver, Colorado over its own line of railroad.

[fol. 161] Plaintiff's Interrogatories to Defendant Chicago, Rock Island and Pacific Railroad Company.

(Filed U. S. District Court, September 20, 1955.)

[fol. 162] The plaintiff requests that the defendant Chicago, Rock Island and Pacific Railroad Company, a corporation, by an officer or officers thereof competent to testify in its behalf, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. What is the name and address of the person having custody of all orders for railroad box cars placed by the Kansas Grain Company with the Chicago, Rock Island and Pacific Railroad Company between the dates of January 27, 1953 and February 11, 1953?

2. What is the name and address of the person who has custody of the record designated as the car order book covering orders placed with the Chicago, Rock Island and Pacific Railroad Company by Kansas Grain Company between the dates of January 27, 1953 and February 11, 1953?

3. What is the name and address of the person employed by the Chicago, Rock Island and Pacific Railroad Company making the inspection of Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287 prior to said car being set on the 17th Street connecting track to the River Track in the City of Council Bluffs, Iowa on February 9, 1953?

[fol. 163] 4. What is the name and address of the person employed by the Chicago, Rock Island and Pacific Railroad Company having custody of the records of inspection made by employees of the Chicago, Rock Island and Pacific Railroad Company of Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287 between the date of January 27, 1953 and February 11, 1953?

5. What is the name and address of the person who made the inspection for Chicago, Rock Island and Pacific Railroad Company of Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287 on February 7, 1953?

6. What are the names and addresses of the switch crew of the Chicago, Rock Island and Pacific Railroad Company which set Chicago, Rock Island and Pacific Railroad Com-

pany Box Car No. 145287 on the 17th Street connecting track to the River Track in the City of Council Bluffs, Iowa at approximately 5 o'clock A.M. on February 9, 1953?

7. What is the name and address of the person having custody of the records of Chicago, Rock Island and Pacific Railroad Company showing all switch operations by the Chicago, Rock Island and Pacific Railroad Company of said company's Box Car No. RI 145287 between the dates of February 7, 1953 and February 24, 1953?

8. What was the procedure followed by the Chicago, Rock Island and Pacific Railroad Company in honoring the orders placed with said company by the Kansas Grain Company on January 28, 1953 and January 29, 1953?

9. What are the names and addresses of all persons having anything to do with the filing of the order for box cars placed by the Kansas Grain Company with the Chicago, Rock Island and Pacific Railroad Company on January 28, 1953 and January 29, 1953 other than persons heretofore named by you in answering of interrogatories heretofore propounded by plaintiff?

10. What are the names and addresses of all persons employed by the Chicago, Rock Island and Pacific Railroad Company having anything to do with the placing of Chi-
[fol. 164] cago, Rock Island and Pacific Railroad Company Box Car No. RI 145287 on the 17th Street connecting track to the River Track in the City of Council Bluffs, Iowa pursuant to the order for box cars of the Kansas Grain Company placed with the Chicago, Rock Island and Pacific Railroad Company on January 28 and January 29, 1953 other than persons heretofore named in answer to previous interrogatories as set out herein?

11. Did the Chicago, Rock Island and Pacific Railroad Company receive orders for box cars from the Kansas Grain Company on January 28 and January 29, 1953?

12. Did the Chicago, Rock Island and Pacific Railroad Company place its Box Car No. RI 145287 on the 17th Street connecting track to the River Track in the City of Council Bluffs, Iowa pursuant to such order?

13. Did any employee of the Chicago, Rock Island and Pacific Railroad Company inspect said railroad's Box Car No. RI 145287 prior to the placing of said car on the 17th Street connecting track to the River Track in the City of Council Bluffs, Iowa?

14. If so, was said car approved for grain loading?

15. What is the name and address of the person employed by Chicago, Rock Island and Pacific Railroad Company having custody and control of all agreements entered between the Chicago, Rock Island and Pacific Railroad Company and the Chicago and Northwestern Railway Company with regard to the switching of cars ordered from the Chicago, Rock Island and Pacific Railroad Company for delivery to the Kansas Grain Elevator in the City of Council Bluffs, Iowa?

16. What is the name and address of the person employed by Chicago, Rock Island and Pacific Railroad Company having custody of the records which disclose the date, time and place the Chicago, Rock Island and Pacific Railroad Company first obtained physical possession of said railroad's Box Car No. RI 145287 after February 10, 1953?

[fol. 165] 17. What are the names and addresses of all persons employed by the Chicago, Rock Island and Pacific Railroad Company having anything to do with said railroad company's Box Car No. RI 145287 between the dates of February 10, 1953 and February 24, 1953?

18. What are the names and addresses of all persons employed by the Chicago, Rock Island and Pacific Railroad Company having anything to do with the rehanging of the door and any other repairs performed on said railroad company's Box Car No. RI 134287 between the dates of February 10, 1953 and February 24, 1953?

19. What is the name and address of the person employed by the Chicago, Rock Island and Pacific Railroad Company having the custody of any records of Chicago, Rock Island and Pacific Railroad Company that would reflect the rehanging of the door or the making of any other

repairs on Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287 between the dates of February 10, 1953 and February 24, 1953?

20. What is the name and address of the person, firm or corporation from whom Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287 was purchased?

[fol. 166] Plaintiff's Interrogatories to Defendant Chicago and Northwestern Railway Company.

(Filed U. S. District Court, September 20, 1955.)

[fol. 167] The plaintiff requests that the defendant Chicago and Northwestern Railway Company, a corporation, by an officer or officers thereof competent to testify in its behalf, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. What was the date, time and place that the Chicago and Northwestern Railway Company first obtained physical possession of Chicago, Rock Island and Pacific Railroad Company Box Car No. RI145287 after February 8, 1953?

2. What is the name and address of the person employed by the Chicago and Northwestern Railway Company in the position of joint checker for the track commonly known as River Track in the City of Council Bluffs, Iowa on February 9, 1953 who completed the form entitled "Daily Yard Check of Cars on Hand" dated February 9, 1953 at 8 o'clock A.M.?

3. What is the name and address of the person employed by Chicago and Northwestern Railway Company on February 9, 1953 in the position of joint checker for the track commonly known as the River Track in the City of Council Bluffs, Iowa who completed the form entitled "Daily Yard Check of Cars on Hand" dated February 10, 1953 at 8 o'clock A.M.?

[fol. 168] 4. What is the name and address of the person employed by Chicago and Northwestern Railway Company

on February 9, 1953 in the position of joint checker for the track commonly known as the River Track in the City of Council Bluffs, Iowa who completed the form entitled "Daily Yard Check of Cars On Hand" dated February 11, 1953 at 8 o'clock A.M.?

5. What is the name and address of the person employed by Chicago and Northwestern Railway Company on February 9, 1953 in the position of joint checker for the track commonly known as the River Track in the City of Council Bluffs, Iowa who completed the form entitled "Report of Cars" dated February 9, 1953?

6. What is the name and address of the person employed by Chicago and Northwestern Railway Company on February 9, 1953 in the position of joint checker for the track commonly known as the River Track in the City of Council Bluffs, Iowa who completed the form entitled "Report of Cars" dated February 10, 1953?

7. What is the name and address of the person employed by Chicago and Northwestern Railway Company on February 9, 1953 in the position of joint checker for the track commonly known as the River Track in the City of Council Bluffs, Iowa who completed the form entitled "Report of Cars" dated February 11, 1953?

8. What is the name and address of the person having the custody of the records entitled "Daily Yard Check of Cars on Hand", "Report of Cars", and the release sheet headed with the words "Lathrop Grain" bearing the dates of February 9, 1953, February 10, 1953 and February 11, 1953?

9. What are the names and addresses of all persons employed by the Chicago and Northwestern Railway Company other than persons named in providing the answers to the above interrogatories, who had anything to do with Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287 between the dates of February 8, 1953 and February 12, 1953?

[fol. 169] 10. Did the Chicago and Northwestern Railway Company at any time between the dates of February

8, 1953 and February 12, 1953 make an inspection of Chicago, Rock Island and Pacific Railroad Company Box Car No. RI145287?

11. Did the Chicago and Northwestern Railway Company obtain any revenue from any other person, firm or corporation for anything it had to do with Chicago, Rock Island and Pacific Railroad Company Box Car No. RI145287 between February 8, 1953 and February 12, 1953?

12. If so, from whom was such revenue received?

13. What is the name and address of the person employed by the Chicago and Northwestern Railway Company having in his custody any agreements entered between the Chicago and Northwestern Company and the Chicago, Rock Island and Pacific Railroad Company with respect to the track commonly known as the "River Track" in the City of Council Bluffs, Iowa?

[fol. 170] Plaintiff's Interrogatories to Defendant Union Pacific Railroad Company.

(Filed U. S. District Court, September 20, 1955.)

[fol. 171] The plaintiff requests that the defendant Union Pacific Railroad Company, a corporation, by an officer or officers thereof competent to testify in its behalf, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. What are the names and addresses of all persons employed by the Union Pacific Railroad Company having in their custody records of the Union Pacific Railroad Company relative to its handling and transporting Chicago, Rock Island and Pacific Railroad Company Box Car No. RI145287 between February 10, 1953 and March 1, 1953?

2. What are the names and addresses of all persons employed by the Union Pacific Railroad Company who had anything to do with the switching, handling, or transporting of Chicago, Rock Island and Pacific Railroad Company Box

Car No. RI145287 from the time the Union Pacific Railroad Company first obtained physical possession of said box car until the time such car was ready for removal from Council Bluffs, Iowa for delivery to the Houlton Grain Company in Denver, Colorado?

3. What are the names and addresses of all persons employed by the Union Pacific Railroad Company who had anything to do with the repair of Chicago, Rock Island and Pacific Railroad Company Box Car No. RI145287 on February 23, 1953 and/or February 24, 1953?

[fo. 172] 4. What is the name and address of any employee of the Union Pacific Railroad Company who is acquainted with and qualified and competent to testify to the standard custom and practice of all railroads delivering cars for loading by the Kansas Grain Company at its elevator at 30th Street and First Avenue in the City of Council Bluffs, Iowa with regard to the inspection of such cars for defects and suitability for loading for grain.

5. What is the name and address of the person or persons having custody of the American Association of Railroads Code of Rules and the records showing the Chicago, Rock Island and Pacific Railroad Company, Chicago and Northwestern Railway Company and Union Pacific Railroad Company to be subscribers thereto?

6. When did the Union Pacific Railroad Company first receive notice that it was to haul and transport Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287 over its lines to Houlton Grain Company, Denver, Colorado?

7. What is the name and address of the general agent of the freight department of the Union Pacific Railroad Company who acknowledged receipt of Kansas Grain Company bill of lading No. 4544 dated February 11, 1953?

[fol. 173] Reply of Defendant Chicago, Rock Island and Pacific Railroad Company to Answer of Defendant Union Pacific Railroad Company to Cross-Claim.

(Filed U. S. District Court, September 27, 1955.)

[fol. 174] Defendant Chicago, Rock Island and Pacific Railroad Company for its reply to the answer of defendant Union Pacific Railroad Company to crossclaim of Chicago, Rock Island and Pacific Railroad Company against said defendant states and shows the Court as follows:

1. No reply is necessary to the allegations of paragraphs 1, 2, 3, 4 and 5 of the answer of defendant Union Pacific Railroad Company to crossclaim.

2. For reply to the matters set forth in paragraph 6 of the answer of Union Pacific Railroad Company to crossclaim, this defendant denies that "no loaded car was accepted by any such railroad for transportation over its line until after it had made the inspection referred to in paragraph 12 of this answer", and this defendant denies that "all such railroads knew that the railroad furnishing such car for loading for grain to the Kansas Grain Company had the duty of inspecting such car before setting such car out for switching to the Grain Company * * * and [fol. 175] that such railroad would in fact undertake to make such inspection, assuming all responsibility in connection therewith, as in fact was done by the Chicago, Rock Island and Pacific Railroad Company in this case." This defendant alleges that any inspection made of car RI 145287 was made by this defendant solely for its own purposes; that such inspection was not made for the protection of other carriers and was not an interchange inspection, for interchange of cars between railroads.

3. No reply is required to paragraphs 7, 8, 9 and 10.

4. For its reply to paragraph 11, defendant denies each, all and every allegation therein contained not specifically herein admitted. Defendant admits that the usual practice and custom known to all defendants was that cars of grain would be loaded at the Kansas Grain Company in the expectation that they would be immediately shipped out,

and that no billing was issued for movement over any specific line of railroad until after the contents of a particular car had been loaded and graded by inspectors of the Omaha Grain Exchange. This defendant denies that the destination and routing of a particular car were not determined until after the result of the grading was known, as cars were never loaded except on the expectation that they would be graded and pass inspection. This defendant admits that, if a railroad did not receive back a particular car or cars which it had made available to the Kansas Elevator Company, it would receive billing for movement over its own line for an equal number of cars which some other railroad had made available to Kansas Grain Company for loading.

5. For reply to paragraph 12 of Union Pacific Railroad Company's answer to cross-claim, this defendant admits that Chicago and Northwestern Railroad Company performs all switching at the Kansas Grain Company elevator at 30th Street and First Avenue in the City of Council Bluffs, Iowa; admits that Union Pacific Railroad was not [fol. 176] a party to any contract concerning the so-called River Track or its sidings, but alleges that, by virtue of the reciprocal switching arrangements at Omaha, Nebraska and Council Bluffs, Iowa, all industries located on sidetracks within the reciprocal switching district in effect became industries on each of the railroads serving the area, so far as accepting billing therefrom was concerned. This defendant admits that on or about January 28, 1953, Kansas Grain Company placed with the office of this defendant at Omaha, Nebraska an order for 35 empty box cars for grain loading, and that such order had been recorded. This defendant denies that it was the standard custom and practice of all railroads furnishing cars to inspect such cars for the protection of other carriers, and specifically denies that this defendant ever undertook to make, or did make, an inspection of car RI 145287 for or on account of the Union Pacific Railroad Company. This defendant denies that said inspection was performed pursuant to, was governed by or subject to the A.A.R. Code of Rules, and states and shows the Court that said A.A.R. Code of Rules relates solely to interchange of cars be-

tween railroad companies, and has no application to instances of the character involving the injuries of plaintiff, W. E. Williams. This defendant admits that on February 9, 1953, car RI 145287, along with two other cars, was set out on the 17th Street connecting track to the River Track by a switch crew of this defendant at approximately 5:00 A. M. on said date; that the point at which said cars were set out was the point at which said cars were customarily set out to be picked up by Chicago & Northwestern Railroad Company's switch crews for spotting at the elevator of Kansas Grain Company; admits that car RI 145287 was set out at the elevator track of Kansas Grain Company or or about February 9, 1953, and was loaded with shelled corn at said elevator on the afternoon of February 10, 1953 by employees of said elevator company; that a sample of grain for the purpose of having it graded by inspectors [fol. 177] of the Omaha Grain Exchange was taken from said car, and that the accident referred to in plaintiff's complaint occurred between 4:15 and 4:30 P. M. on February 10, 1953. This defendant admits that the sample of grain was inspected and graded at the Omaha Grain Exchange and the result of such inspection transmitted to Kansas Grain Company on February 11, 1953; denies that the employees at the elevator in Council Bluffs, Iowa, were informed that the car was consigned to Houlton Grain Company at Denver, Colorado, and alleges that said car was in fact consigned to "Kansas Grain Company, Denver, Colorado, notify Houlton Grain Company"; denies that the elevator employees at Council Bluffs, Iowa, were told that said car was to be routed via this defendant and Union Pacific Railroad Company, and alleges that the car was in fact billed by Kansas Grain Company and accepted by Union Pacific only over the lines of Union Pacific Railroad Company. This defendant admits that on February 11, 1953, a shipper's order bill of lading, directing the shipment of car RI 145287 from Kansas Grain Company elevator at Council Bluffs, Iowa, to Denver, Colorado, was prepared by employees of Kansas Grain Company at Omaha, Nebraska. This defendant denies each, all and every allegation contained in paragraph 12 of the answer of defendant Union Pacific Railroad Company to the cross-claim of this defendant, except those hereinabove specifically admitted.

Further answering paragraph 12 of the answer of defendant Union Pacific Railroad Company to the cross-claim of this defendant, this defendant alleges that, with respect to the particular shipment involved in this accident, defendant Union Pacific Railroad Company had legal possession of such car prior to the time of the accident; alleges that it became primarily responsible to plaintiff W. E. Williams for the condition of said car, and that it in fact furnished the car to Kansas Grain Company; that Kansas Grain Company would, in the normal course of business, at some subsequent date bill out a car furnished by Union Pacific Railroad Company to the Kansas Grain Company over the lines of this defendant, and in such instance this defendant [fol. 178] would be responsible for the condition of such car. This defendant specifically denies that the A. A. R. Code of Rules and Car Service Rule 7 have any application to this case, or in any way control, or govern the rights of any of the parties herein. This defendant alleges that, as a matter of law, defendant Union Pacific Railroad Company was responsible for the condition of said car at all times after the loading thereof was commenced, that the accident occurred while the car was in the legal possession of defendant Union Pacific Railroad Company, and at a time when Union Pacific Railroad Company had the primary responsibility for the condition of said car; this defendant admits that Kansas Grain Company might have routed such car over the lines of this defendant, or over the lines of Chicago, Burlington & Quincy Railroad Company to Denver, Colorado.

6. This defendant denies each, all and every allegation contained in paragraph 13 of the answer of Union Pacific Railroad Company to cross-claim, and alleges that the inspection made of the car by employees of this defendant on February 7, 1953, was not made for the benefit of Union Pacific Railroad Company or any other line of railroad which might assume possession and derive revenue from the use of car RI 145287 in transportation service.

Wherefore, defendant Chicago, Rock Island & Pacific Railroad Company prays as in its original cross-claim.

[fol. 179] Response of Defendant Chicago and Northwestern Railway Company to Plaintiff's Requests for Admissions of Facts.

(Filed U. S. District Court, September 28, 1955.)

[fol. 180] Defendant Chicago and North Western Railway Company makes the following statement in response to the request for admission of facts served upon it by plaintiff on September 20, 1955.

Request No. 1 is admitted under information and belief.

Request No. 2 is admitted under information and belief.

Request No. 3 is admitted.

Request No. 4 is admitted.

Request No. 5 is admitted.

Request No. 6 is admitted.

Request No. 7 is admitted under information and belief.

Request No. 8 is admitted.

Request No. 9 is admitted under information and belief.

Request No. 10 is admitted.

Request No. 11 is admitted under inforamtion and belief.

Request No. 12 is admitted under information and belief.

Request No. 13 is admitted.

[fol. 181] Request No. 14 is admitted to the extent that said car was loaded with grain during the afternoon of February 10, 1953. As to whether said car was moved in an easterly direction for loading this defendant has no information.

Request No. 15 is neither admitted nor denied, this defendant has no information with respect thereto.

Request No. 16 is admitted.

Request No. 17 is admitted.

Request No. 18 is admitted.

Request No. 19 is neither admitted nor denied. This defendant has no information with respect thereto.

Request No. 20 is neither admitted nor denied. This defendant has no information with respect thereto.

Request No. 21 is neither admitted nor denied. This defendant has no information with respect thereto.

Request No. 22 is neither admitted nor denied. This defendant has no information with respect thereto.

Request No. 23 is admitted.

Request No. 24 is admitted.

Request No. 25 is neither admitted nor denied. This defendant has no information with respect thereto.

Request No. 26 is neither admitted nor denied. This defendant has no information with respect thereto.

Request No. 27 is neither admitted nor denied. This defendant has no information with respect thereto.

[fol. 182] Response of Defendant Chicago and Northwestern Railway Company to Request for Admissions of Facts by Defendant Chicago, Rock Island and Pacific Railroad Company.

(Filed U. S. District Court, September 28, 1955.)

[fol. 183] Defendant Chicago and North Western Railway Company makes the following statement in response to the request for admissions of facts served upon it by the defendant Chicago, Rock Island and Pacific Railroad Company on September 16, 1966.

Request No. 1 is admitted under information and belief.

Request No. 3 is admitted under information and belief.

Request No. 4 is admitted.

Request No. 5 is admitted.

Request No. 6 is admitted.

Request No. 7 is admitted.

Request No. 8 is admitted.

Request No. 9 is admitted under information and belief.

Request No. 10 is admitted under information and belief.

Request No. 11 is admitted to the extent that on February 9, 1953, the exact time being unknown to this defendant, a Chicago, Rock Island and Pacific Railroad Company switch crew set out RI car No. 145287 owned by Chicago, Rock Island and Pacific Railroad Company, on the 17th [fol. 184] Street track at the customary place for cars moving to the Kansas Grain Company Elevator for loading. It is further admitted that the car was inspected for grain loading by an inspector employed by the Chicago, Rock Island and Pacific Railroad Company on February 7, 1953, and that following such inspection he placed a placard on said car reading "O.K. for Grain Loading."

Request No. 12 is admitted.

Request No. 13 is admitted.

Request No. 14 is admitted on information and belief.

Request No. 15. This defendant has no information as to request No. 15 and therefore can neither admit nor deny same.

Request No. 16. This defendant has no information as to request No. 16 and therefore can neither admit nor deny same.

Request No. 17. This defendant has no information as to request No. 17 and therefore can neither admit nor deny same.

Request No. 18. This defendant has no information as to request No. 18 and therefore can neither admit nor deny same.

Request No. 19. This defendant has no information as to request No. 19 and therefore can neither admit nor deny same.

Request No. 20. This defendant has no information as to request No. 20 and therefore can neither admit nor deny same.

Request No. 21. This defendant has no information as to request No. 21 and therefore can neither admit nor deny same.

Request No. 22. This defendant has no information as to request No. 22 and therefore can neither admit nor deny same.

Request No. 23. This defendant has no information as to request No. 23 and therefore can neither admit nor deny same.

Request No. 24. This defendant has no information as to request No. 24 and therefore can neither admit nor deny same.

[fol. 185] Request No. 25 is admitted.

Request No. 26 is admitted.

Request No. 27 is admitted.

Request No. 28. This defendant has no information as to request No. 28 and therefore can neither admit nor deny same.

Request No. 29. This defendant has no information as to request No. 29 and therefore can neither admit nor deny same.

Request No. 30. This defendant has no information as to request No. 30 and therefore can neither admit nor deny same.

Request No. 31. This defendant has no information as to request No. 31 and therefore can neither admit nor deny same.

Request No. 32. This defendant has no information as to request No. 32 and therefore can neither admit nor deny same.

Request No. 33. This defendant has no information as to request No. 33 and therefore can neither admit nor deny same.

Request No. 34 is admitted.

Request No. 35. This defendant has no information as to request No. 35 and therefore can neither admit nor deny same.

Request No. 36. This defendant has no information as to request No. 36 and therefore can neither admit nor deny same.

Request No. 37 is admitted.

Request No. 38. This defendant has no information as to request No. 38 and therefore can neither admit nor deny same.

Request No. 39 is admitted.

[fol. 186] Motion of Defendant Chicago, Rock Island and Pacific Railroad Company to Quash Certain of Plaintiff's Requests for Admission of Facts and Interrogatories.

(Filed U. S. District Court, September 28, 1955.)

[fol. 187] Comes now the defendant Chicago, Rock Island & Pacific Railroad Company, being served by counsel for the plaintiff with a Request for Admission of Facts numbered from one to twenty-seven, inclusive, moves to quash the following numbered requests for admission of facts for each and all of the reasons hereinafter set forth and thereupon states and shows the court as follows:

Defendant moves to quash the following numbered requests for admission of facts:

1. Request for Admission of Facts No. 10 for the reason that same calls for a conclusion and not a fact; that defend-

dant is willing to admit that on February 7, 1953 car RI 145287 was inspected by one Bert Neumann, an employee of this defendant, and that said car was carded "O.K. for grain loading"; that said inspection was a routine inspection and was not made in the expectation that said car would be applied on any particular order or for any parti-
[fol. 188] cular industry, and this defendant should not be required to state that the inspection was made as a result of the orders placed on January 28 and January 29, 1953.

2. This defendant objects and moves to quash Request for Admission No. 24 and No. 25 for the reason that the same calls for facts occuring subsequent to the time that the plaintiff was injured and the car was billed over the line of the Union Pacific Railroad Company and that the previous requests show that the action taken by this defendant would be solely as a switching movement for interchange to the line of Union Pacific Railroad Company.

3. This defendant objects and moves to quash Request for Admission No. 26 for the reason that same is immaterial and irrevelant; that the condition referred to was long subsequent to the time that plaintiff's injuries were sustained and that it relates to matters not germane to any issues before the court or jury.

4. This defendant objects to Request for Admission No. 27 and moves to quash the same for the reason that same calls for facts solely within the knowledge of the defendant Union Pacific Railroad Company insofar as the date any repairs on car RI 145287 were made by Union Pacific Railroad Company. Defendant has no objection to the portion reading "*** and therafter transported said car to Denver, Colorado, over its own line of railroad."

[fol. 189] Defendant Chicago, Rock Island & Pacific Railroad Company further objects to the interrogatories addressed to this defendant by plaintiff and moves to quash the portion thereof hereinafter set forth in the interrogatories served on this defendant on or about September 20, 1955.

1. Defendant objects to and moves to quash interrogatory No. 6 which calls for the names and addresses of the switch crew of the Chicago, Rock Island & Pacific Railroad Company which set out car RI 145287 on the 17th Street connecting track to the River Track in the city of Council Bluffs, Iowa, at approximately 5:00 A.M. on February 9, 1953, for the reason that this defendant has admitted that the car was set out and the names and addresses of the employees of this defendant are superfluous and immaterial and unduly encumber the record.

2. Defendant objects to and moves to quash Interrogatory No. 7 for the reason that the same refers to matters occurring subsequent to the time of plaintiff's alleged injuries, at a time when the car was under billing by Union Pacific Railroad Company and at a time when this defendant was acting only as agent for said Union Pacific Railroad Company.

3. This defendant objects to and moves to quash Interrogatory No. 9 for the reason that the Request for Admissions gave plaintiff all information necessary with respect to the action taken by this defendant in filling the order for box cars placed by Kansas Grain Company with this defendant on January 28 and January 29, 1953. Requiring this defendant, to answer Interrogatory No. 9, will unduly encumber the record.

[fol. 190] 4. This defendant objects to and moves to quash Interrogatory No. 10 for the reason that the same is immaterial and irrelevant, and for the reasons set forth in the objections to Interrogatory No. 6, and that the substance thereof is fully covered by Interrogatories No. 11 to No. 14, inclusive, as to which this defendant is willing to make answer.

5. This defendant objects to and moves to quash Interrogatory No. 16 for the reason that same relates to matters subsequent to the occurrence of plaintiff's injuries; that the interrogatory calls for information with respect to movement of car RI 145287 after same was billed by defendant Union Pacific Railroad Company and is immaterial and irrelevant.

6. This defendant objects to and moves to quash Interrogatory No. 17 for the reason that same calls for the names and addresses of witnesses with respect to car RI 145287 between February 10 and February 24, 1953; that said interrogatory is improper, calls for the disclosure of a large number of persons and imposes an undue burden and hardship upon this defendant when this defendant has aleady indicated its willingness to answer all pertinent inquiries.

7. This defendant objects to and moves to quash Interrogatory No. 18 for the reason that same calls for the names and addresses of witnesses with respect to car RI 145287 between February 10 and February 24, 1953; that said interrogatory is improper, calls for the disclosure of a large number of persons and imposes an undue burden and hard-
[fol. 191] ship upon this defendant when this defendant has already indicated its willingness to answer all pertinent inquiries.

8. This defendant objects to and moves to quash Interrogatory No. 19 for the reason that same calls for the names and addresses of witnesses with respect to car RI 145287 between February 10 and February 24, 1953; that said interrogatory is improper, calls for the disclosure of a large number of persons and imposes an undue burden and hardship upon this defendant when this defendant has already indicated its willingness to answer all pertinent inquiries.

9. This defendant objects to and moves to quash Interrogatory No. 20 for the reason that the same is immaterial and irrelevant, and that the answer to Request for Admissions discloses that defendant admits the ownership of box car RI 145287.

[fol. 192] Plaintiff's Reply to Requests for Admissions of Facts by Defendant Chicago, Rock Island and Pacific Railroad Company.

(Filed U. S. District Court, September 29, 1955.)

[fol. 193] State of Iowa,

County of Pottawattamie.

Williams E. Williams, plaintiff in the above entitled action, makes the following statements in response to the

request for admission of facts served upon him by defendant, Chicago, Rock Island and Pacific Railroad Company by ordinary mail on September 16, 1955:

1. That plaintiff admits that Flour Mills of America, Inc., now operates and at all times material, did operate a terminal grain elevator under the trade name and style of Kansas Grain Company at Thirtieth Street and First Avenue, in the City of Council Bluffs, Iowa; that said Flour Mills of America, Inc., maintains an office in Omaha, Nebraska under the trade name of "Kansas Grain Company."

2. Subject to the objection of plaintiff that the facts alleged in paragraph 2 of said request for admission of facts are immaterial and irrelevant, plaintiff admits that said Kansas Grain Company Elevator had a storage capcity exceeding five million bushels of grain.

[fol. 194] 3. That plaintiff admits that said Kansas Grain Elevator continually receives, ships and stores large quantities of grain, practically all of which moves to or from said elevator in railroad box cars. That this plaintiff is without sufficient information to form a belief as to the truth or falsity of the statements that said railroad box cars are from all major lines of railroads serving the Omaha-Council Bluffs area.

4. That plaintiff admits that the Kansas Elevator is, and was located adjacent to, and at all times material has been served by railroad industry track known as the "River Track", which was constructed in First Avenue, a street running east and west in the City of Council Bluffs, Iowa, but is without sufficient information to form a belief as to the truth or falsity of the statement that said tract was constructed by authority of the City Council of the City of Council Bluffs, Iowa, or that said track was constructed many years ago by the Chicago, and Northwestern Railway Company, and objects to said allegations of which it does not have sufficient knowledge to form a belief as being immaterial and irrelevant.

5. Subject to the objection by plaintiff that said allegations are immaterial and [irrlevant], plaintiff states that he is without sufficient information to form a belief as to

the truth or falsity of the alleged statements of fact that since the year 1889 and continuing to the present time, Chicago, Rock Island and Pacific Railroad Company, Chicago, Burlington and Quincy Railroad Company and Chicago and Northwestern Railway Company have served all industries on or adjacent to the "River Track" under contractual arrangements with Chicago and Northwestern Railway Company but which Chicago, Rock Island and Pacific Railroad Company and Chicago, Burlington and Quincy Railroad Company have acquired rights to operate and use the River Track, so that all industries located on or adjacent to the River Track, including the Kansas Grain Elevator Company are considered by all railroads in the Omaha-Council Bluffs area as industries located on the lines of the three railroad companies above referred to; further, [fol. 195] that the switching of cars on the River Track and the setting of same to the Kansas Grain Elevator and removal therefrom has for many years been done by crews and engines of Chicago and Northwestern Railway Company. That plaintiff admits that at all times material to plaintiff's cause, the defendant, Chicago and Northwestern Railway Company, has been the owner of the railroad industry track known as the "River Track", and has under contractual arrangements with the Chicago, Rock Island and Pacific Railroad Company and Chicago, Burlington and Quincy Railroad Company, agreed to do all of the switching of cars on the River Track of cars furnished to shippers adjacent to and served by said River Track.

6. That subject to the objection that the alleged statements of fact contained in paragraph 6 of defendant, Chicago, Rock Island and Pacific Railroad Company's request for admission of facts, is immaterial and irrelevant as to any issue in plaintiff's cause of action this plaintiff states that he is without sufficient knowledge and information to form a belief as to the truth or falsity of the statements made therein.

7. That subject to the objection that the alleged statements of fact contained in paragraph 7 of defendant, Chicago, Rock Island and Pacific Railroad Company's request for admission of facts, is immaterial and irrelevant as to

any issue in plaintiff's cause of action this plaintiff states that he is without sufficient knowledge and information to form a belief as to the truth or falsity of the statements made therein.

8. Subject to the objections of plaintiff that the allegations of fact contained in paragraph 8 of the request for admissions of the defendant, Chicago, Rock Island and Pacific Railroad Company to the effect that officers and employees of the Kansas Grain Company Elevator placed orders with practically all railroad companies serving the Omaha-Council Bluffs area for empty cars for grain loading; and such empty cars reach the Kansas Elevator by interchange between such other railroads, and one of the three cars which serve the River Track, are irrelevant [fol. 196] and immaterial, plaintiff states that he is without sufficient knowledge or information to form a belief as to the truth or falsity of said alleged statements of fact as pertain to all empty cars ordered from all railroad companies. That plaintiff admits that Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287, ordered by the officers and employees of the Kansas Grain Company Elevator at Thirtieth Street and First Avenue in the City of Council Bluffs, Iowa, on or about January 28, and January 29, 1953, and furnished said Elevator on or about February 9, 1953, was set out by the defendant, Chicago, Rock Island and Pacific Railroad Company on the track known as the "Severteenth Street Connection Track to the River Track" for delivery to the Kansas Grain Company Elevator and that said car was physically set or spotted at or adjacent to the said Kansas Grain Company Elevator by engines and Crews of the Chicago, and Northwestern Railway Company.

9. That plaintiff admits that in February, 1953, and prior thereto, it was the custom and practice for the officers and employees of the Kansas Grain Company Elevator at Thirtieth Street and First Avenue in the City of Council Bluffs, Iowa, to place orders for empty box cars for grain loading substantially in advance of the needs of the elevator for actual loading; and that such cars were supplied by the railroad with which the order was placed as cars were available. Further, plaintiff admits that on January 28 and Jan-

uary 29, 1953, officers and employees of the Kansas Grain Company Elevator at Thirtieth Street and First Avenue in the City of Council Bluffs, Iowa, placed orders with the defendant, Chicago, Rock Island and Pacific Railroad Company for a total of thirty-five cars for grain loading.

10. That subject to the objection by plaintiff that the alleged statements of fact contained in paragraph 10 of defendant, Chicago, Rock Island and Pacific Railroad Company's request for admission of facts are immaterial and irrelevant, plaintiff states that he is without sufficient [fol. 197] knowledge or information to form a belief as to the truth or falsity of the statements contained in said paragraph 10.

11. That plaintiff admits that on February 9, 1953, at approximately 5:00 o'clock A.M., a switch crew of the Chicago, Rock Island and Pacific Railroad Company set out on the Seventeenth Street Connecting Track to the River Track, at the customary place for cars moving to the Kansas Grain Company Elevator at Thirtieth Street and First Avenue in the City of Council Bluffs, Iowa, Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287; that the setting out of said car was the result of orders placed with the defendant, Chicago, Rock Island and Pacific Railroad Company by officers and employees of said Kansas Grain Company Elevator on January 28 and January 29, 1953; that plaintiff admits that when said box car was delivered to the side track of said Kansas Grain Company Elevator by the Chicago and Northwestern Railway Company for and on behalf of the defendant, Chicago, Rock Island and Pacific Railroad Company, said box car bore a placard reading "O.K. for grain loading". That plaintiff is without sufficient knowledge or information to form a belief as to the truth or falsity of any other alleged statements of fact contained in paragraph 11 of the request for admission of facts of defendant, Chicago, Rock Island and Pacific Railroad Company.

12. That plaintiff admits that between the hours of 6:30 o'clock P.M. and 11:15 o'clock P.M. on February 9, 1953,

a switch crew of the Chicago and Northwestern Railway Company moved Chicago, Rock Island and Pacific Railroad Company box car No. RI 145287 from the "Seventeenth Street Connecting Track" and set the same on a siding west of and at the Kansas Grain Company Elevator at Thirtieth Street and First Avenue in the City of Council Bluffs, Iowa, in the usual position where empty cars for loading at the Elevator were set out by Chicago and Northwestern Railway Company.

[fol. 198] 13. That plaintiff admits that during the afternoon of February 10, 1953, Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287, together with one or more other cars, was loaded with grain at said Kansas Grain Company Elevator by employees of said Elevator.

14. That plaintiff admits that box cars were loaded with grain at the Kansas Grain Company Elevator in the City of Council Bluffs, Iowa, only upon orders for such loading being placed by the Omaha office of said Company. Further, plaintiff admits that no orders were given to load grain except in expectation of immediate outbound shipment, and to complete, or fill, specific contractual commitments, or orders, of the Grain Company.

15. That plaintiff admits that the usual custom and practice followed by employees of the Omaha office of the Kansas Grain Company was to call the Kansas Grain Company by telephone and direct the loading of a specified number of bushels of wheat, corn, rye or oats and the grade of such grain. Although on some occasions the employees at the Omaha office of Kansas Grain Company might inform the employees of the Elevator of the destination to which the car was to be shipped, it was the custom and practice for the employees at the Omaha office of Kansas Grain Company to merely inform the Elevator employees of the amount and grade of grain to be loaded. That plaintiff admits that no employee of Kansas Grain Company now has any specific recollection of the exact words that were used by the employee of the Omaha office

of the Kansas Grain Company in placing the order for the loading of 2,000 bushels of No. 2 Yellow Corn for shipment to Houlton Grain Company at Denver, Colorado, on or about February 10, 1953.

16. Subject to plaintiff's objection that the statements made in paragraph 16 of defendant, Chicago, Rock Island and Pacific Railroad Company's request for admissions are immaterial and irrelevant and so vague and indefinite as to time that plaintiff cannot ascertain exactly what said defendant is asking plaintiff to admit, plaintiff states that on receipt of the request from the Omaha office for loading [fol. 199] certain grain cars on February 10, 1953, the employees of the Kansas Grain Company Elevator at Thirtieth Street and First Avenue in the City of Council Bluffs, Iowa, proceeded to load a sufficient number of cars to comply with such request. The cars loaded were selected from the available supply on hand, all of which were empty cars which had been delivered to the elevator on order, including Chicago, Rock Island and Pacific Railroad Company Box Car No. RI 145287 which was furnished said elevator by defendant, Chicago, Rock Island and Pacific Railroad Company pursuant to orders placed with it on January 28 and January 29, 1953. That plaintiff denies that any of the cars loaded on February 10, 1953 had been unloaded and made empty at the elevator.

17. Subject to plaintiff's objection that the statements made in paragraph 17 of defendant, Chicago, Rock Island and Pacific Railroad Company's request for admissions are immaterial and irrelevant, plaintiff states that some of the cars loaded with grain received inbound at the elevator and made empty there were considered as available for loading by the elevator provided such car, after being emptied, inspected and a placard placed thereon reading "O.K. for grain loading". After such cars were inspected and approved for grain loading the elevator would feel free to reload such cars and after loading, send them on the line of any railroad company directed by the Omaha office, irrespective of the line of railroad from which the car had been received for unloading on inbound movement to the elevator.

18. That plaintiff admits that upon completion of the loading of cars at the Kansas Grain Company Elevator, the usual custom and practice of the elevator employees was to close the doors of the grain cars and place seals thereon, after samples were taken for inspection and grading by the Omaha Grain Exchange at Omaha, Nebraska. That plaintiff further states that this custom and practice was followed with regard to Chicago, Rock Island and Pacific Railroad Company box car No. RI 145287 at the [fol. 200] time plaintiff sustained the injuries of which he complains in this action.

19. Subject to plaintiff's objection that the statements made in paragraph 19 of defendant, Chicago, Rock Island and Pacific Railroad Company's request for admissions are immaterial and irrelevant, plaintiff admits the statements made therein.

20. Subject to plaintiff's objection that the statements made in paragraph 20 are immaterial and irrelevant, plaintiff admits the statements made in said paragraph 20.

21. That plaintiff admits that on the morning of February 11, 1953, the Omaha office of the Kansas Grain Company made up shipper's order bill of lading in form prescribed by classifications and tariffs of western railroads, for car RI 145287, for shipment from Kansas Grain Company (Division of Flour Mills of America, Inc.) at Council Bluffs, Iowa, consigned to Kansas Grain Company, Denver, Colorado; notify Houlton Grain Company, Denver, Colorado. That seven copies of said bill of lading were delivered to Western Weighing and Inspection Bureau offices in the Omaha Grain Exchange on said morning. That after said Western Weighing and Inspection Bureau authorized transit of said car, a traffic representative of the Union Pacific Railroad Company picked up original and one copy of said bill of lading from the Western Weighing and Inspection Bureau. That the Western Weighing and Inspection Bureau retained one copy of such bill of lading and returned four copies thereof to Kansas Grain Company's Omaha office. That plaintiff is without sufficient information to form a belief as to the truth or falsity of all

other statements contained in paragraph 21 of said request for admissions and therefore denies same.

22. That plaintiff admits the statements made in paragraph 22.

23. That plaintiff admits it was the custom and practice for the employees of the Omaha office of the Kansas Grain Company to notify employees at Kansas Grain Company Elevator in Council Bluffs of the routing of each car by telephone at the time of or shortly after bills of lading [fol. 201] for particular cars were prepared. The employees of the Kansas Grain Company Elevator in Council Bluffs customarily notified the yard checker employed by Chicago and Northwestern Railway Company to handle records of cars on the River Track of the routing of such car and it was customary, either that same day or within a few hours thereafter for the Kansas Grain Company Elevator employees in Council Bluffs to make up a so-called switching order and deliver same to said yard checker. Plaintiff denies that it was the custom and practice for the Omaha office to advise the Council Bluffs employees of the destination of such car but merely tell them the routing.

24. Plaintiff admits that in this instance a switching order, including Chicago, Rock Island and Pacific Railroad Company box car No. RI 145287 along with certain others, was made up, dated February 11, 1953, and delivered to the yard checker of the Chicago and Northwestern Railway Company on or about said date. Plaintiff further admits that the switching order made up by the Kansas Grain Company Elevator was on a form headed "Lathrop Grain Company" but in absence of having the original or certified copy thereof submitted to him, plaintiff is in no position to admit genuineness as requested by defendant, Chicago, Rock Island and Pacific Railroad Company in its request No. 24.

25. Subject to plaintiff's objection that the statements made in paragraph 25 of the request for admissions are immaterial and irrelevant, plaintiff states that he is without sufficient information or knowledge to form a belief as to the truth or falsity of the statements therein contained.

26. That plaintiff admits that following the occurrence of the injury to plaintiff, Chicago, Rock Island and Pacific Railroad Company box car No. RI 145287 was switched from the Kansas Grain Company Elevator at Thirtieth Street and First Avenue in the City of Council Bluffs, Iowa, by an engine and crew of the Chicago and Northwestern Railway Company to the point at which cars were customarily received by Chicago, Rock Island and Pacific [fol. 202] Railroad Company and that said car was removed by a switch crew of the Chicago, Rock Island and Pacific Railroad Company to a track known as the Repair Track in the yards of the Chicago, Rock Island and Paeific Railroad Company in the City of Council Bluffs, Iowa.

27. That plaintiff admits that Chicago, Rock Island and Pacific Railroad Company box car No. RI 145287 remained in the physical possession of Chicago, Rock Island and Pacific Railroad Company until February 23, 1953, at which time it was set out by a switch crew of the Chicago, Rock Island and Pacific Railroad Company at the point at which cars were customarily received by the Union Pacific Railroad Company.

28. That plaintiff admits that Chicago, Rock Island and Pacific Railroad Company box car RI 145287 was taken by a switch crew of the Union Pacific Railroad Company from the point at which cars were customarily received by the Union Pacific Railroad Company from the Chicago, Rock Island and Pacific Railroad Company on February 24, 1953.

29. That plaintiff is without sufficient information or knowledge to form a belief as to the truth or falsity of the statements contained in paragraph 29 of the request for admissions of the defendant, Chicago, Rock Island and Pacific Railroad Company.

30. Subject to plaintiff's objection that the statements made in paragraph 30 of the request for admissions of defendant, Chicago, Rock Island and Pacific Railroad Company are immaterial and irrelevant, plaintiff states that he is without sufficient information or knowledge to form a

belief as to the truth or falsity of the statements made in said paragraph 30.

31. Subject to plaintiff's objection that the statements made in paragraph 31 of said request for admissions are immaterial and irrelevant, the plaintiff states that he is without sufficient information or knowledge to form a belief as to the truth or falsity of the statements made in paragraph 31.

32. Subject to plaintiff's objection that the statements made in paragraph 32 of said request for admissions are immaterial and irrelevant, plaintiff states that he is without sufficient information or knowledge to form a belief as [fol. 203] to the truth or falsity of the statements made in paragraph 32.

33. Subject to plaintiff's objection that the statements made in paragraph 33 of said request for admissions are immaterial and irrelevant, plaintiff admits that the defendant, Chicago, Rock Island and Pacific Railroad Company made no charge and received no payment from Kansas Grain Company for its car No. RI 145287 or for switching the car or performing any transportation service of said car, or its contents.

34. Subject to plaintiff's objection that the statements made in paragraph 34 of the request for admissions of the defendant, Chicago, Rock Island and Pacific Railroad Company are immaterial and irrelevant, plaintiff states that it is without sufficient information or knowledge to form a belief as to the truth or falsity of the statements made in said paragraph 34.

35. Subject to plaintiff's objection that the statements made in paragraph 34 of the request for admissions of defendant, Chicago, Rock Island and Pacific Railroad Company are immaterial and irrelevant, plaintiff states that he is without sufficient information or knowledge to form a belief as to the truth or falsity of the statements made in said paragraph 35.

36. Subject to plaintiff's objection that the statements made in paragraph 36 of the request for admissions of de-

fendant, Chicago, Rock Island and Pacific Railroad Company are immaterial and irrelevant, plaintiff states it is the custom and practice for employees of the Kansas Grain Company Elevator, with the knowledge of all defendants, in filling orders for car loading received from the Omaha office of the Kansas Grain Company to load the next car on the loading track that is suitable for grain loading regardless of the line from which such car has been ordered and regardless of the line over which same will be transported to the consignee. Further, the Kansas Grain Company, with the knowledge of all defendants, endeavors to see that a railroad furnishing cars received the same number of cars for hauling over its particular line as it has furnished the Kansas Grain Company. The plaintiff further states that in cases in which an empty car is received from one railroad but billed out over another railroad, the routing directions of the Kansas Grain Company to the [fol. 204] joint checker, also known as yard checker, employed by the Chicago and Northwestern Railway Company on the River Track, specified that the switch movement from the Elevator to the railroad over whose line the car will be transported is to be performed by the railroad from which the car had been ordered and by which it had been furnished. In the case of cars unloaded and made empty at the Elevator, inspected and approved for grain loading at the elevator, and then billed out, the Kansas Grain Company does not generally specify any particular railroad to perform the switching service from the elevator to the line of railroad accepting the bill of lading.

37. Subject to defendant's objection that the statements made in paragraph 37 of the request for admissions of the Chicago, Rock Island and Pacific Railroad Company are immaterial and irrelevant, plaintiff states that he is without sufficient information or knowledge to form a belief as to the truth or falsity of the statements contained in said paragraph 37.

38. That plaintiff admits the statements made in paragraph 38 of the request for admission of Chicago, Rock Island and Pacific Railroad Company.

39. In reply to request for admission No. 39 plaintiff states that he has never seen the American Railroads Code of Rules in any form and therefore is without sufficient information or knowledge to make any admission with regard to the genuineness of said Rules in any form.

(Signed and verified by Plaintiff)

[fol. 205] Motion of Defendant Union Pacific Railroad Company to Strike Reply of Defendant Chicago, Rock Island and Pacific Railroad Company to Answer of Defendant Union Pacific Railroad Company to Cross-Claim.

(Filed U. S. District Court, September 30, 1955.)

[fol. 206] Comes now the defendant Union Pacific Railroad Company and moves the Court to enter an order striking the Reply of Chicago, Rock Island and Pacific Railroad Company to Answer of Defendant Union Pacific Railroad Company to Crossclaim for the reason that there is no provision in law for the filing of a reply to a cross-claim, and the same has been filed contrary to Rule 7(a) of the Federal Rules of Civil Procedure.

[fol. 207] Response of Defendant Union Pacific Railroad Company to Requests for Admissions of Facts by Defendant Chicago, Rock Island and Pacific Railroad Company.

(Filed U. S. District Court, September 30, 1955.)

[fol. 208] Defendant Union Pacific Railroad Company makes the following response to Defendant Chicago, Rock Island and Pacific Railroad Company's request for admissions:

1. This defendant admits the truth of the request for admissions contained in paragraphs numbered 1 to 10, inclusive, of such request for admission of facts.

2. Relative to the request for admissions contained in paragraph 11, this defendant admits the first two sentences thereof. As to the last sentence, it admits that the car referred to was inspected by an inspector employed by Chicago, Rock Island and Pacific Railroad Company on Feb. 7, 1953, and a placard reading "OK for grain loading" was placed on the car at that time. As to the statement contained in such sentence that the car was "found suitable for grain loading", this defendant cannot either admit or deny the same. If by such demand we are requested to admit only that Rock Island's inspector concluded that the car was suitable for grain loading, we will admit this. If it is intended as a demand that we admit that the car was in fact suitable for grain loading, we cannot either admit or deny, for the reason that Union Pacific did not have control or physical possession of such car until after the accident occurred, and never owned the same and did not even know that an accident had occurred for nearly a year afterward, and thus had no opportunity to investigate the facts as to the inspection or condition of the car prior to the accident other than as shown by Rock Island's records and investigation.

3. This defendant admits the requests contained in paragraphs 12, 13 and 14.

[fol. 209] 4. Relative to the requests contained in paragraph 15 of such request for admissions, this defendant admits the statements contained in the first sentence thereof. Relative to the second sentence of said paragraph 15, this defendant denies that it was the practice for the employees at the Omaha office of Kansas Grain Company to inform the elevator employees of the destination to which the car was to be shipped prior to the issuance of the bill of lading. The destination of any car could not be finally determined until after the tests of the grain for grade were completed. As to the last sentence of this paragraph wherein the request is made to admit that "No employee of Kansas Grain Company now has any specific recollection of exactly what instructions were given the employees at the elevator with respect to loading cars on or about February 10, 1953, for shipment to Houlton Grain Company at Den-

ver, Colorado", this defendant cannot either admit or deny the same. It is beyond the power of anyone other than the employee himself to say whether or not he has a specific recollection of the matters referred to in such paragraph.

5. This defendant admits the requests contained in paragraphs 16 to 20, inclusive, of the request for admissions.

6. Relative to paragraph 21 of such request for admissions, this defendant admits the statements contained therein and states that it will produce the original duplicate copy of the shipping order or the original bill of lading at the trial.

7. Relative to paragraphs 22 and 23 of such request for admissions, this defendant admits the truth thereof.

8. Relative to the request contained in paragraph 24, this defendant admits the truth of such request, except that it cannot admit the genuineness of the document referred to therein since no copy thereof has been attached to the request for admissions, as required by the Federal Rules of Civil Procedure.

9. This defendant admits the truth of the statements contained in paragraphs 25 to 31, inclusive, of such request for admissions.

[fol. 210] 10. Relative to paragraph 32 of such request for admissions, this defendant admits the truth of such statement, but in connection therewith and in explanation thereof states that such charge of $4,86 referred to therein was not paid since at the time of including car RI 145287 in a list with other cars for which the switching charge was made, such car had not been received by Union Pacific Railroad Company from Chicago, Rock Island and Pacific Railroad Company; thus, Union Pacific employees could not account for such charge. It was therefore eliminated, and Chicago, Rock Island and Pacific Railroad Company did not subsequently bill the Union Pacific for such amount.

11. Relative to the statements contained in paragraph 33 of such request for admissions, this defendant admits that

it is a party with the other defendants to what is commonly called a per diem agreement or established per diem rules, and that the standard current rate in Febraury, 1953, was as specified therein. This defendant denies the statement that under such agreement "railroad companies joining therein agree to pay for the use of freight cars owned by other railroad companies while on the rails of, or held by, or for the account of, another railroad company."

12. Relative to the request for admissions contained in paragraph 35 thereof, this defendant denies the truth of the statements contained therein.

13. Relative to the request for admissions contained in paragraph 36 thereof, this defendant denies the statement therein relative to the loading of cars for movement over the lines of other railroads than from where the car was received, wherein it is stated "but where this was inconvenient to the elevator employees they frequently, to the knowledg of all defendants, would load out a car which had been ordered from one railroad over the line of another railroad." This defendant admits in connection with such statement that on occasion such employees did route a car [fol. 211] over the line of a railroad other than that from which the car had been received and that all of the defendant railroads knew that this was a practice followed at times. The remaining statements in such paragraph are admitted.

14. Relative to the statements contained in paragraphs 37 and 38 of such requests for admissions, these statements are admitted.

15. Relative to the request for admission of the Code of Rules referred to in paragraph 39, this defendant is prepared to admit the genuineness of such Code when a genuine copy is presented to it. It cannot admit the statement as contained in paragraph 39 since no copy of such Code is attached to the request for admission, as required by the Federal Rules of Civil Procedure.

[fol. 212] Answers of Defendant Union Pacific Railroad Company to Interrogatories of Plaintiff.

(Filed U. S. District Court, September 30, 1955.)

[fol. 213] Defendant Union Pacific Railroad Company, for answer to the interrogatories served upon it by the plaintiff in the above case, makes the following answers and responses:

Answer to Interrogatory No. 1: W. M. Calhoun, Agent, 4541 Pierce Street, Omaha, Nebraska; G. M. Braun, Chief Clerk, 1102 7th Avenue, Council Bluffs, Iowa; Martin Coy, Assistant Chief Yard Clerk, 1805 6th Avenue, Council Bluffs, Iowa; G. M. Gerhard, Head Clerk, 6815 Maple Street, Omaha, Nebraska.

Answer to Interrogatory No. 2: With reference to this interrogatory, we do not have information as to which crew did the switching, handling or transporting of the car referred to, although it is possible that either one of the two sets of crews shown below could have done so. It is more probable that the crew headed by Engineer Lostroh handled it.

H. B. Keller, Yardmaster, 2927 Avenue E, Council Bluffs, Iowa; A. L. O'Neill, Sr., Yardmaster, 122 Angle Avenue, Council Bluffs, Iowa;

W. B. Edwards, Engineer, 2430 Avenue D, Council Bluffs, Iowa; John Penney, Fireman, Grell Court, Council Bluffs, Iowa; W. R. Thacker, Engine Fireman, 2102 Avenue G, Council Bluffs, Iowa; M. D. Spear, Helper, 2531 5th Avenue, Council Bluffs, Iowa; R. L. Moon, Helper, 902 Avenue H, Council Bluffs, Iowa;

[fol. 214] A. H. Lostroh, Engineer, 104 E 29th Avenue, Council Bluffs, Iowa; P. Hartley, Fireman, 1505 2nd Avenue, Council Bluffs, Iowa; J. E. Kaufman, Engine Foreman, 2204 4th Avenue, Council Bluffs, Iowa; L. M. McDonald, Helper, 1606 4th Avenue, Council Bluffs, Iowa; Richard Gappa, Helper (no longer employed; last address known: 621 3rd Street, Council Bluffs, Iowa);

Eugene M. Diller, Car Checker, Rural Route, Council Bluffs, Iowa.

Answer to Interrogatory No. 3: L. E. Brendle, Foreman, 1407 Marshall Avenue, Council Bluffs, Iowa; W. L. Henry, Repairman, 2416 So. 11th, Council Bluffs, Iowa; L. L. Kunick, Car Inspector, 2941 3rd Avenue, Council Bluffs, Iowa; L. J. Mann, Car Inspector, 3002 5th Avenue, Council Bluffs, Iowa; F. O. Pickett, Car Inspector, (no longer employed; last address known: 1943½ Lake Avenue, Pueblo, Colorado); L. E. Rhoades, Repairman, 1120 4th Avenue, Council Bluffs, Iowa; C. W. Sprinkel, Car Inspector, 1329 Avenue F, Council Bluffs, Iowa; S. A. Wescott, Repairman, 4132 Maple Street, Omaha, Nebraska.

Answer to Interrogatory No. 4: Dale Payne, 6815 Minne Lusa Boulevard, Omaha, Nebraska, is an employee of Union Pacific Railroad Company who can testify to the standard custom and practice of Union Pacific Railroad Company delivering cars for loading by the Kansas Grain Company at its elevator at 30th Street and First Avenue in the City of Council Bluffs, Iowa, with regard to the inspection of such cars for defects and suitability for loading for grain and can testify as to his understanding of what the standard custom and practice is of the other railroads so delivering cars.

Answer to Interrogatory No. 5: Mr. Charles E. Ahlquist, A.A.R. Assistant, 6728 Dodge Street, Omaha, Nebraska.

Answer to Interrogatory No. 6: At or about 10:45 a.m., Feb. 11, 1953.

[fol. 215] Answer to Interrogatory No. 8: Mr. R. C. Dargy, Freight Traffic Agent, 4501 Shirley Street, Omaha, Nebraska.

[fol. 217] Response of Defendant Union Pacific Railroad Company to Plaintiff's Requests for Admissions of Facts.

(Filed U. S. District Court, September 30, 1955.)

[fol. 218] Defendant Union Pacific Railroad Company admits the truth of all requests for admissions contained

therein, with the exception of the request for admission in No. 22 thereof in which it is stated "That Western Weighing and Inspection Bureau authorized transit of said box car #RI 145287 to Houlton Grain Company of Denver, Colorado via Union Pacific Railroad Company and delivered original and one copy of said bill of lading No. 4544 to one R. A. Foral, General Agent of the Freight Department of the Union Pacific Railroad Company at or about 10:45 o'clock A.M. on February 11, 1953". This defendant denies that the original and one copy of the bill of lading referred to was delivered to R. A. Foral as stated in such request for admission, but admits that a copy of the bill of lading was in fact delivered to R. C. Dargy, Freight Traffic Agent of such defendant; the original bill of lading was not delivered to him; otherwise such statement is correct.

[fol. 219] Plaintiff's Amendment to Reply to Requests for Admissions of Facts by Defendant Chicago, Rock Island and Pacific Railroad Company.

(Filed U. S. District Court, September 30, 1955.)

[fol. 220] State of Iowa,

County of Pottawattamie—ss.

William E. Williams, plaintiff in the above entitled action, make the following additional statements in response to paragraph eleven of the Request for Admission of Facts served upon him by defendant, Chicago, Rock Island and Pacific Railroad Company by ordinary mail on September 16, 1955:

1. As to the statement contained in paragraph eleven that Chicago, Rock Island and Pacific Railroad Company box car No. RI 145287 was inspected and found suitable for grain loading, if it is requested by such statement that plaintiff admit that said car was in fact suitable for grain loading or that said car was not defective in any way,

plaintiff denies same and states that said car ws not suitble for grain loading and was in fact defective at all times prior to its repair.

[fol. 221] Amendment of Defendant Chicago and Northwestern Railway Company to its Response to Requests for Admissions of Facts by Defendant Chicago Rock Island and Pacific Railroad Company.

(Filed U. S. District Court, October 3, 1955.)

[fol. 222] Defendant Chicago and North Western Railway Company amends its response to the request for admission of facts served upon it by the Chicago, Rock Island and Pacific Railroad Company in the following respects:

1. Relative to the request contained in No. 15, this defendant admits the statements contained in the first sentence thereof. This defendant admits the last sentence of this request, in which it is stated that no employee of Kansas Grain Company now has any specific recollection of exactly what instructions were given the employees at the elevator with respect to loading cars on or about February 10, 1953, for shipment to Houlton Grain Company at Denver, Colorado. As to the allegations of the second sentence of Request No. 15, this defendant admits that on some occasions it was the practice for the employees at the Omaha office of Kansas Grain Company to inform the elevator employees of the destination to which a car was to be shipped, and admits that this was not always done.

[fol. 223] 2. This defendant withdraws its answers to Requests Nos. 16, 17, 18, 19, 20, 21, 22, 23 and 24, and in lieu thereof states that it is informed and believes the facts to be as stated in said requests for admissions and therefore admits same, except that it cannot admit the genuineness of the document referred to in Request No. 24, no copy of said document having been attached to the request for admissions, as required by Rule 36 of the Federal Rules of Civil Procedure.

3. This defendant withdraws its answers to Requests No. 28 through No. 33 and in lieu thereof admits the truth of same.

4. This defendant withdraws its answer to Request No. 35 and in lieu thereof states that it admits that there was a general custom and practice among railroads in Council Bluffs for the company owning a car to make a per diem reclaim against the railroad line on which the car was billed for shipment from the time that the loading of the car was commenced to the industry billing the car out. This defendant has no information as to whether any per diem reclaim charge was made against the Union Pacific Railroad Company by the Chicago, Rock Island and Pacific Railroad Company for the use of car RI 145287 while being loaded by Kansas Grain Company or in the physical possession of the Chicago, Rock Island and Pacific Railroad Company, and has no means of ascertaining the fact as to this request for admissions or as to the reasons why such charge was or was not made.

5. Having no reason to believe that the facts with respect to the custom of employees of the Kansas elevator are not as stated in the 36th Request for Admissions, this defendant admits the facts to be as stated.

[fol. 224] 6. The answer to Request No. 38 is withdrawn and in lieu thereof this defendant states that same is admitted.

[fol. 225] Motion of Defendant Chicago, Rock Island and Pacific Railroad Company to Strike Portions of Plaintiff's Reply to its Request for Admission of Facts, or in the Alternative, for an Order Requiring Plaintiff to Admit or Deny the Truth of the Requests.

(Filed U. S. District Court, October 3, 1955.)

[fol. 226] Defendant Chicago, Rock Island & Pacific Railroad Company respectfully moves the court to strike the plaintiff's reply to request for admission of facts insofar as the same pertains to requests numbers 5, 6, 7, 8, 10, 11,

15, 16, 17, 21, 23, 24, 25, 29, 30, 31, 32, 34, 35, 36, 37 and 39, or, in the alternative, to require plaintiff to either admit or deny the facts stated in the requests and for grounds of this motion states and shows the court as follows:

1. That plaintiff has neither admitted nor denied the truth of the facts set forth but has with respect to most of the interrogatories set forth above, merely stated that "he is without sufficient knowledge and information to form a belief as to the truth or falsity of the statements"; that [fol. 227] such equivocal answer is not a compliance with Rule 36 of the Federal Rules of Civil Procedure and that plaintiff must either admit or deny the truth of the requests and in his denial may state his reasons for inability to answer affirmatively.

2. With respect to many of the interrogatories set forth above plaintiff has neither admitted nor denied the facts requested in the Request for Admissions but has attempted to qualify his answers by stating additional matters of fact and conclusions which is not permitted under the provisions of Rule 36 of the Federal Rules of Civil Procedure.

[fol. 228] Motion of Defendant Chicago, Rock Island and Pacific Railroad Company for Order Directing Filing its Reply to Answer of Defendant Union Pacific Railroad Company to Cross-Claim.

(Filed U. S. District Court, October 3, 1955.)

[fol. 229] Defendant Union Pacific Railroad Company has filed, in this cause, a motion to strike the reply of Chicago, Rock Island & Pacific Railroad Company to the answer of Union Pacific Railroad Company to Cross-Claim of Chicago, Rock Island & Pacific Railroad Company on the ground that same is not provided for by Rule 9 of the Federal Rules of Civil Procedure. Defendant Chicago, Rock Island & Pacific Railroad Company states and shows the court that its reply to the answer to cross-claim sets out material facts which have a direct bearing upon the rights and obligations of the parties and said defendant, therefore, moves the court for the entry of an order allowing or directly the filing of said reply.

[fol. 230] Answers of Defendant Chicago, Rock Island and Pacific Railroad Company to Plaintiff's Interrogatories.

(Filed U. S. District Court, October 3, 1955.)

[fol. 231] For answer to interrogatories propounded by plaintiff, defendant Chicago, Rock Island & Pacific Railroad Company states as follows:

1. Elmer E. Smith, Rock Island Freight House, Omaha, Nebraska, is the person having general custody of all orders for railroad box cars placed by Kansas Grain Company with this defendant at the time specified in Interrogatory No. 1.

2. For answer to Interrogatory No. 2 this defendant states that Elmer E. Smith, Rock Island Freight House, Omaha, Nebraska, has custody of the car order book covering orders for cars at the times specified in the interrogatory.

3. For answer to Interrogatory No. 3 this defendant states the only person making an inspection of car RI 145287 was Bert Neumann, Rock Island Car Shop, south of South Avenue, Council Bluffs, Iowa.

[fol. 232] 4. For answer to Interrogatory No. 4 defendant states that the name and address of the person employed having custody of the records of inspection made by employees of this defendant of car RI 145287 between January 27, 1953 and February 10, 1953, inclusive, prior to the date of plaintiff's injury is R. C. Dowell, Rock Island Car Shop, Council Bluffs, Iowa. On February 11, 1953 inspection of said car was made by said R. C. Dowell and Harlan S. Hughes, Lead Car Man, Rock Island Car Shop, Council Bluffs, Iowa, and R. C. Dowell has the record of such inspection. Said car was likewise inspected on February 11, 1953 by Elmer E. Smith, Rock Island Freight House, Omaha, Nebraska, W. W. Campbell, Rock Island Passenger Station, Des Moines, Iowa, and no record of inspection with respect to the two latter inspections was retained.

5. For answer to Interrogatory No. 5 this defendant states that Bert Neumann, address 2115 Sixth Avenue, Council Bluffs, Iowa, is the person who inspected car RI 145287 on February 7, 1953.

6. This defendant for answer to Interrogatory No. 8 states that the procedure followed by this defendant in compliance with orders for cars placed by Kansas Grain Company was substantially as follows:

Upon the placing of the order it was recorded in what is known as the car order book in the office of the local freight agent at the Rock Island Freight House in Omaha, Nebraska. A clerk in the office of the local freight agent [fol. 233] would then ascertain by telephone to the yard office of the railway company in Council Bluffs whether there were available cars for grain loading and if not would then contact the car shop in Council Bluffs to determine whether there were available, at that point, cars for loading of grain. If cars were available in the yard directions were given by telephone as to the number of cars to be set to the River Track. The numbers of the cars available would be secured from lists of cars on hand and an order would be prepared to a switch crew to pick up and move such cars to the connection track to the River Track. Usually the designation to which the cars were to be set was indicated by the yard clerk placing chalk marks on the sides of the cars specifying the particular elevator or industry to which the cars were ultimately to be set. If cars were not available in the yard but were to be made available on the repair track or the cleaning track in the yard a switch order would be given for the movement of such cars. The cars selected were then moved by the switch engine of this defendant to the connecting track where they were set out and then movement of the cars was made from that point to the elevator by crews and engines of Chicago & Northwestern Railway Company.

7. For answer to Interrogatory No. 11 this defendant answers the same yes.

8. For answer to Interrogatory No. 12 this defendant answers the same yes, with the expectation that car RI 145287 would be billed over the lines of this defendant for [fol. 234] movement or if it did not receive that car it would receive a car actually ordered by Kansas Grain Company from some other railroad.

9. For answer to Interrogatory No. 13 this defendant states car RI 145287 prior to its being placed on the 17th Street connecting track to the River Track in the city of Council Bluffs, Iowa, was inspected by Bert Neumann as set forth in the answer to Interrogatory No. 3.

10. This defendant for answer to Interrogatory No. 14 states that car RI 145287 was marked "O.K. for grain loading".

11. This defendant for answer to Interrogatory No. 15 states that the name and address of the person employed by Chicago, Rock Island & Pacific Railroad Company having custody and control of all agreements between this defendant and Chicago & Northwestern Railway Company, is M. Z. Greenley, and that his address is La Salle Street Station Building, 139 W. Van Buren Street, Chicago, Illinois.

[fol. 235] Answers of Defendant Chicago and Northwestern Railway Company to Plaintiff's Interrogatories.

(Filed U. S. District Court, October 3, 1955.)

[fol. 236] Comes Now the defendant Chicago and North Western Railway Company and, by way of answer to the interrogatories served on it by the plaintiff on the 20th day of September, 1955, states:

Interrogatory No. 1. The first record that the Chicago and North Western Railway Company has of having obtained physical possession of Chicago, Rock Island and Pacific Railroad Company box car No. RI 145287 is at 8:00 A. M. on February 9, 1953 on the 17th Street track.

Interrogatory No. 2. The person employed by the Chicago and North Western Railway Company as joint checker for the River Track in Council Bluffs, on February 9, 1953, was C. Brooks, who is no longer employed by the railway company and whose address is unknown to the railway company.

Interrogatory No. 3. H. U. Edwards, 2803 Avenue D, Council Bluffs, Iowa.

Interrogatory No. 4. H. U. Edwards, 2803 Avenue D, Council Bluffs, Iowa.

[fol. 237] Interrogatory No. 5. C. Brooks, who is no longer employed by the railway company and whose address is unknown to the railway company.

Interrogatory No. 6. H. U. Edwards, 2803 Avenue D, Council Bluffs, Iowa.

Interrogatory No. 7. H. U. Edwards, 2803 Avenue D, Council Bluffs, Iowa.

Interrogatory No. 8. E. R. Budde, 2115 3rd Avenue, Council Bluffs, Iowa.

Interrogatory No. 9. P. R. Filkins, 2502 So. 6th Street, Council Bluffs, Iowa; C. B. Tisher, 221 So. 25th Street, Council Bluffs, Iowa; G. A. Gill, 403 No. 6th Street, Council Bluffs, Iowa; Charles G. Poetzel, 2718 Avenue B, Council Bluffs, Iowa; Theodore F. Peterson, 1812 Oak Street, Omaha, Nebraska; E. Beard, R.F.D. No. 4, Council Bluffs, Iowa; L. G. Love, 25 No. 9th Street, Apt. 2, Council Bluffs, Iowa, and R. G. Snethen, 1922 5th Avenue, Council Bluffs, Iowa.

Interrogatory No. 10. Yes, the Chicago and North Western Railway Company made an inspection of Chicago, Rock Island and Pacific Railroad Company box car No. RI 145287 on February 11, 1953.

Interrogatory No. 11. No.

Interrogatory No. 12. Not answered.

Interrogatory No. 13. E. A. Vik, 400 W. Madison Street, Chicago, Illinois, Secretary of the defendant Chicago and North Western Railway Company.

[fol. 238] The following matters came on for hearing before the Court on October 3, 1955:

1. The Motion of [Defencant] Chicago and Northwestern Railway Company for Judgment on Pleadings or Summary Judgment.

2. Motion of Defendant Chicago, Rock Island and Pacific Railroad Company to Quash Certain Requests for Admissions of Facts and Interrogatories of Plaintiff.

3. Motion of Defendant Union Pacific Railroad Company to Strike Reply of Chicago, Rock Island and Pacific Railroad Company to Answer to Cross-Claim.

4. Motion of Defendant Chicago, Rock Island and Pacific Railroad Company to Strike Plaintiff's Reply to Request for Admissions of Facts or in the Alternative for an Order Requiring Plaintiff to Either Admit or Deny the Request.

5. Motion of Chicago, Rock Island and Pacific Railroad Company for an Order Directing the Filing of Its Reply to Answer to Cross-Claim of Defendant Union Pacific Railroad Company.

Order Ruling Upon Motions.

(Filed U. S. District Court, October 5, 1955.)

[fol. 239] United States District Court
Southern District Of Iowa
Western Division

W. E. Williams, Plaintiff,
No. 1-196. vs. Civil.
Chicago, Rock Island and Pacific Railroad Company, et al., Defendants.

In the above entitled cause the following motions—

1) by defendant Chicago and Northwestern Railway Company for summary judgment.

2) by defendant Chicago, Rock Island and Pacific Railroad Company to quash request for admissions of facts and interrogatories propounded by plaintiff.

3) by defendant Union Pacific Railroad Company to strike reply of Chicago, Rock Island and Pacific Railroad Company to answer of defendant Union Pacific Railroad Company to cross-claim

4) by Chicago, Rock Island and Pacific Railroad Company to strike plaintiff's reply to request for admissions of fact, etc.

5) by Chicago, Rock Island and Pacific Railroad Company to file a reply to answer to cross-claim

came on for hearing before the court at Council Bluffs, Iowa, on October 3, 1955, counsel for all parties being present, and at the conclusion thereof the court overruled the motions presented by the Chicago, Rock Island and Pacific Railroad Company, to wit, motions designated above as (2) and (4); sustained the motion by the Union Pacific Railroad Company, designated above as (3), which in effect denies the request of the Chicago, Rock Island and Pacific Railroad Company to file said reply (5); and took the motion of the Chicago and Northwestern Railway Company, designated above as (1), under advisement.

Upon further consideration of the motion of the Chicago and Northwestern Railway Company for summary judgment;

It Is Ordered that said motion be and the same is hereby overruled.

[fol. 240] In accord with the ruling of the court announced at the hearing and as stated above herein;

It Is Ordered that the motion of the Union Pacific Railroad Company to strike the reply of the Chicago, Rock Island and Pacific Railroad Company to an answer to the latter's cross claim, referred to above as motion (3), be and the same is hereby sustained.

It Is Further Ordered that the remaining motions of the Chicago, Rock Island and Pacific Railroad Company referred to above as motions (2), (4) and (5), be and the same are hereby overruled.

Exceptions allowed.

[fol. 241] (Proceedings upon Trial before Jury.)

The cause came on for trial before Hon. William F. Riley, Judge, and a jury, October 10, 1955, at 9:30 o'clock a.m. The jury was impaneled and sworn.

Opening statement on behalf of plaintiff was made by Mr. Harold T. Beckman, in which he stated:

This is a suit brought to recover for personal injuries sustained by plaintiff against all three defendant railroads on the theory that they owed plaintiff, on February 10, 1953, a duty to see that the box car alongside of which he was working, and the door of which he was attempting to close was in reasonably safe condition so as to prevent injury to Mr. Williams. He charges the three defendants jointly and severally with negligence in failing to properly inspect R.I. box car #145287 prior to delivery to his place of employment, and in delivering to his employer, Kansas Grain Company, a car that was defective. * * * * *

This accident occurred on February 10, 1953, at approximately 4:15 p.m. at the Kansas Grain Company elevator at 30th Street and First Avenue in the City of Council Bluffs. February 10, 1953 was a crisp, sunshiny day; the ground was frozen. 30th Street is a street that runs north and south in the City of Council Bluffs and First Avenue runs east and west. There are railroad tracks in what is known as First Avenue owned by defendant Chicago and Northwestern Railroad Co. The elevator is served by a track called the "River Track," laid in First Avenue, which is served by Chicago and Northwestern Railroad. In addition to the River Track there were three other tracks all of which were side tracks coming into the Kansas Grain Company elevator, which is one of the industries served by this River [fol. 242] Track. The first track north of the River Track was known as the "hold track", the second track as the "loading track", and the third track the "unloading track". These three tracks ran from east to west through a lean-to shed commonly known as the loading, or work, shed of the Kansas Grain Company elevator and it was in this work shed where grain was loaded and unloaded.

About January 28 or 29 the employer of Mr. Williams placed an order with defendant Chicago, Rock Island and Pacific Railroad Company for approximately 35 cars for grain loading. It was the practice for defendant Chicago, Rock Island & Pacific Railroad Company to deliver cars as they became available. The evidence will show that on February 7, 1953, pursuant to that order, an employee of defendant Rock Island inspected car #RI 145287 and put on that car a placard stating that the car was "O.K. for grain

loading". On the morning of February 9, 1953 a switch crew of defendant Rock Island delivered that car to the track connecting with the River Track, the place where the Rock Island customarily delivers cars that are being furnished industries located along the "River Track" for placing at the Kansas Grain Company elevator by defendant, Chicago & Northwestern Railway Company. Some time during the evening of February 9, 1953, the Chicago & Northwestern Railway Company moved that car to the side track of the Kansas Grain Company elevator. On the morning of February 10, 1953, when employees of Kansas Grain Company elevator came to work, that car RI 145287 was sitting on the loading track. During the course of the day six cars were loaded with grain and this Rock Island car 145287 was the fifth car loaded that day. After the car was loaded, it was moved in an easterly direction on the loading track about 100 feet east of the loading shed. While it was [fol. 243] so situated one of the employees of Kansas Grain Company elevator took a grain sample from that car. After that an attempt was made to close the door on that car and some difficulty was experienced in doing so.

Mr. Williams was working at loading these cars with grain. He climbed down from the loading platform, walked over to the employee who had been attempting to close the door and suggested that he go and take a grain sample from the sixth car, and that he, Williams, would attempt to close this car door. Williams then called to another employee to come and help close that door. When there is difficulty in closing these car doors, it was the custom and practice among elevator employees and employees of defendants to use a bar and chain three to six feet long with links in it, which was attached to the lock on the door, and then the bar to the door keep, at the front of the door, to try to pull the door closed. When it was closed to within about one foot and one-half, Mr. Williams stated to this other employee that he was going to go to the back of the door and try to pry the door forward. As Mr. Williams stooped to pick up the bar, the other employee released the handle of the door, stepped back, and as he did so shouted, "look out". Mr. Williams raised up and saw this door approximately two to three feet out from the top of the car. Mr. Williams ran in a northwesterly direction to get

out from under the car door. The door fell on him, threw him across the rails of the side track to the north, breaking his back, breaking his leg, and knocking out several of his teeth.

The evidence will show that other employees of the eleva- [fol. 244] tor picked up this heavy door and slid it up the track; plaintiff was taken to the hospital by an emergency vehicle and was seen by Drs. Pester and Limbert; that as a result of the negligence of these defendants, jointly or severally or the negligence in anyone of them in delivering a car that was defective, the plaintiff sustained a fractured back of the tenth dorsal and fourth lumbar vertebrae, the tibia—the large bone in the right leg was broken completely apart and that it was put back together by an open reduction of metal screws; that the plaintiff had abrasions about the face and neck; that he had lost teeth, and was bleeding from the mouth.

The evidence will further show that on or about February 26, 1953 a blood clot, commonly known as pulmonary embolism, developed and that between February 26, 1953 and March 9, 1953 the life of this man hung between life and death; that plaintiff remained hospitalized for about 2½ months; that he was returned to the hospital after 3½ months; that during all of this period he wore a plaster cast over his body extending from below the chin to the bottom of his hips and also a cast on his right leg; that these casts were removed May 25, 1953 and the leg cast was replaced by a walking cast.

Evidence will show that this man was wholly and completely disabled from February 10, 1953 until July, 1954.

The evidence in this case will also show that the defendants, or one of them at least, were negligent in delivering a defective car; that the door post in this car was defective; will show the function of this door post and why the top of [fol. 245] this door fell out; that the car was defective when it was delivered to Kansas Grain Company elevator.

The evidence will show plaintiff's medical expense of over $500, hospital expense of $1,108.95 and dental expense of $140; that prior to the accident plaintiff was an able-bodied man capable of earning between $3,000 and $4,000

per year; that this man can no longer perform the work which he was qualified to perform prior to the accident; that he could have remained on this job for the rest of his life and that his life expectancy was 15.77 years at the time of the accident; that plaintiff sustained pain and suffering and loss of earnings.

After further opening statement describing the plaintiff's injuries, the treatment and estimates of disability sustained, noon recess of the court was taken from 12:00 noon to 1:45 P.M. and reconvened pursuant to adjournment:

[fol. 246] Mr. Beckman continued his opening statement as follows:

"After the adjournment for lunch, I recalled that I had not explained to you what the evidence will show in regard to the Union Pacific and its handling of this Rock Island car 145287. This sample of grain from this car was taken over to the Omaha Grain Exchange, where it was graded, and the Omaha office of Kansas Grain Company was notified of the grade of that grain. A bill of lading was then made out for this car in which Kansas Grain Company was consignor, or shipper, and also consignee of the car, to Denver, with the car ultimately to be delivered to Houlton Grain Company at Denver, Colorado to go by way of the Union Pacific Railroad.

On the morning of February 11, 1953, the Kansas Grain Company employees at the elevator were notified to release the car to the Rock Island Railroad Company and the Union Pacific Railroad Company, and it was released by delivering a release sheet to the joint checker employed by the defendant Chicago & Northwestern Railway Company at the River Track. On that same date the Chicago & Northwestern Railway Company picked up Rock Island car 145287, took it to the usual position where the Rock Island received cars and left it, and thereafter the defendant Rock Island took that car to what is known as the "repair track", and held it until about February 23, and took it to what is known as the pool yard here in Council Bluffs for delivery to the Union Pacific Railroad. The evidence will further show the activities of the Union Pacific Railroad Company [fol. 247] in receiving that car, the inspection of that car,

and findings on that car, and the ultimate disposition of the car. That is how the Union Pacific Railroad Company became a party to this action; and any duty that is placed upon them in law would make them liable also to this plaintiff."

The Court: I believe the opening statements of counsel for the defendants may be made in the order in which they are named in the pleadings.

Mr. Howland: The court has allowed to each of the defendants in this action a period of fifteen minutes in which to make an opening statement of the issues. * * * With respect to many of the facts concerning which Mr. Beckman has addressed you, there will be no conflict in the evidence. With respect to many of the facts, there will be conflicts in the evidence. Perhaps I can best present the matter to you, and clarify the matter in your thinking, by stating at the outset some of the matters concerning which there will be no dispute in the facts.

Mr. Williams, in the month of February, 1953, was an employee of the elevator located at 30th and First Avenue. He performed the usual duties incident to loading and unloading grain cars, which was largely done with power equipment of various types and kinds. The track laid in First Avenue in the city of Council Bluffs was owned by the Chicago, Northwestern Railway Company and, by virtue of certain contractual arrangements, the Rock Island and Burlington Railroads had the right to handle cars on that siding or track, while the Northwestern performed [fol. 248] all of the spotting or switching service of cars coming in or going out on that particular track.

There will be considerable question as to the extent of Mr. Williams' injury, as to the permanency of it, but there will be no question but what Mr. Williams was hurt when the car door came off of the box car and fell upon him. There will be no conflict in the evidence concerning the matters which Mr. Beckman has spoken about during the period since the noon recess. In other words, it will be, as I understand it, undisputed that the Union Pacific Railroad Company issued the through bill of lading for the

movement of this car from the elevator of the Kansas Grain Company through to Denver, Colorado. It will also be undisputed that to-date the Rock Island Railroad has received no compensation of any kind, no revenue, no payment from anyone for the handling of that car between Council Bluffs at the elevator and Denver, Colorado, and we think that is an exceedingly important factor, and must be given consideration under the instructions which Judge Riley will give you.

The evidence will disclose that prior to the time that this car was sent to the "River Track" at about 5 o'clock on the morning of February 9, 1953, it was examined and inspected by employees of defendant Rock Island Railroad. Nothing was found to be out of order. The Rock Island employees did not see the car again until sometime on the 11th of February, at which time the door was off the car.

At that time there were certain things which had occurred [fol. 249] which indicated that there had been some involvement of the car. Not only was the handle that holds the hasp on the door of that freight car badly bent and there were bright marks on it, but in addition the stirrup step, which had been found to be in good condition at the time of the inspection, was bent inward and pulled to one side toward the door of the car. So we think the evidence will justify the conclusion that something occurred to that car after it left the hands of the Rock Island Railroad.

I referred a moment ago to the fact that there would be no dispute but that the bill of lading was issued by the Union Pacific Railroad Company for movement of this car to Denver, Colorado. The railroad companies doing business in the United States interchange their freight cars all over the country. It is necessary for the business and commerce of the country that that be done, and if you have had occasion to observe a particular freight train go by you may have observed from the numerals and indications on those freight cars, but one or two apparently are cars of the railroad hauling that particular train. As between the railroad companies, there is what is known as a per diem arrangement under which a car, made available for loading at an industry by a railroad which does not obtain the carrier-haul or the line-haul, the line-haul railroad pays to the switching railroad, a switching charge for its service,

which is paid out of the revenues of the carrier-road or the line-haul road. In other words, in this case if the Rock Island were to receive anything for movement of this car [fol. 250] at all it would come from the Union Pacific Railroad Company, and not from Kansas Grain Company, and would have been merely a charge for moving the car inbound to the Kansas elevator for loading, and outbound from the Kansas elevator to the Union Pacific connection, at what Mr. Beckman has referred to as the pool yard here in Council Bluffs.

We think that the evidence will demonstrate beyond any question that this car, while it was a Rock Island car, was legally and factually in the possession of Union Pacific Railroad Company at all times while at the Kansas Grain Company side track, and while it was loading at that point, because under the operation of these rules which will be explained to you by our evidence, the Union Pacific Railroad Company was the railroad which legally and factually had possession of the car.

Now my time has almost expired.

Now I ask only that you pay close attention to the evidence as it comes in. Naturally it is going to be a little bit intricate. These railroad people have a lot of terms that pertain to the particular work in the railroad line, the interchange of cars, the per diem, the per diem reclaim, and all of those terms are something that are new to most of us. I think that when you have heard the evidence that the situation will be such that Mr. Webster, Mr. Johnson or myself will be justified in coming before you and asking a verdict at your hands in favor of the Rock Island. That will be based both on legal grounds and on factual grounds as well, because whatever the condition of that car at the time that Mr. Williams suffered this injury was not a matter for which the defendant Rock Island was legally or factually responsible.

[fol. 251] Mr. Davis, attorney for defendant Chicago & Northwestern Railway Company, then made an opening statement which included the following:

The facts are not in serious dispute except for the facts relating to what Mr. Williams did or did not do with respect to attempting to close the car door and the extent of

his injuries and the amount of disability that he may have suffered. The legal effect to be given to those facts, as you might indicate, from the number of lawyers that are here, is something else. This is principally the problem of the Court and the things in connection with the facts which you will have to pass on in this case relating to the Northwestern Railroad and what he had to do with the handling of this car, I wish to make this brief observation: as is agreed upon by all parties the Kansas Grain Company, Mr. Williams' employer, ordered 35 cars for grain loading from the Rock Island Railroad. The Rock Island Railroad selected from its cars the one which is involved. They had one of their employees whose duty it was to make inspections inspect the car and the evidence will be undisputed that upon his inspection he placed a placard or a card of some type on the car in which he stated that he felt that the car was suitable for grain loading. Under an arrangement which had been in existence for many years and as the Kansas Grain Company happened to be on a piece of railroad track owned by the Northwestern, the Northwestern had an agreement with the Rock Island whereby the Rock Island placed cars they wanted at a certain industry on what was called the 17th Street track. The cars, when they were placed on that track, had been inspected by the Rock Island and the Northwestern had been notified to [fol. 252] what industry they were to be delivered and pursuant to that agreement the Northwestern picked this car up after the Rock Island had placed it on the 17th Street track, took it over to the Kansas Grain Company and left it there for further handling by the Kansas Grain Company. The Northwestern had nothing further to do with that car until it became necessary to return it to the Rock Island after the accident happened. It returned the car to the Rock Island for such handling as the Rock Island saw fit after the car had been loaded and the door had come off and the man had been hurt.

It was not the Northwestern's car, it was not ordered from them, they did not inspect it and we did not agree to furnish a car suitable for grain loading. They merely acted as the mechanical agency of moving the car for the Rock Island pursuant to its fulfillment of an order from the Kansas Grain Company for cars. There will be other facts brought out but all we did was move the car from 17th

Street to 30th pursuant to an agreement with the Rock Island after the Rock Island had placed the car with us and put a placard on it saying "This car is fit for grain loading."

Mr. Anderson: I think perhaps it could be made a little clearer than it has been that the burden is upon the plaintiff to show that someone is to blame for whatever happened to Mr. Williams—not only to show that something happened but to show who is responsible. Mr. Beckman recognized that fact in his opening statement when he said he would prove there was negligence in failing to properly inspect a car which was defective for the purpose of being loaded with grain.

[fol. 253] Now there isn't going to be any dispute that the Union Pacific had nothing to do with this car until after this accident happened. The bill of lading was not issued until the day following the accident when, as a common carrier, the Union Pacific had a duty to accept and transport over its line any car that might be brought to it. This was not a Union Pacific car. It was owned by the Rock Island. We had no duty to make an inspection. The inspection was made by the Rock Island and they put a placard on it which said, "O.K. for grain loading." Without any possession, or knowledge on the part of the Union [fol. 254] Pacific this car was transported as the result of an order that had been placed by Kansas Grain Company with the Rock Island. It was mentioned to you that it is necessary that the grain be graded in the process of determining where a car was to go. Until that grade is determined after the car is loaded, they are not in a position to say over whose line, or where that particular car may go. The upshot of that is that until the car is loaded and the grade of the grain is determined, even the Kansas Grain Company cannot be certain where a given shipment is going.

This car was loaded around 4 o'clock in the afternoon of February 10, and the accident occurred at about 4:15 of that afternoon. The sample of grain was taken to be graded by the Omaha Grain Exchange. The evidence will show that when a car is loaded in the afternoon the grade

is not determined until the following day, so the grade on this carload of grain was determined on February 11, and after that determination the Kansas Grain Company found they had a car that would fill the order of Houlton Grain Company in Denver, Colorado, and decided to ship it over Union Pacific Railroad. At 10:45 a.m. on February 11, the day after the accident, when the accident had already happened, something that we knew nothing about, we were given a bill of lading for that car and finally transported it to Denver, Colorado.

Now Mr. Howland has made some statement about per diem agreements. Of course, there are per diem agreements between railroads for the use of cars. There will be no evidence that these per diem agreements have anything to do about responsibility for injuries suffered as the result of a defective car. Nothing at all. It is merely pay-[fol. 254a] ment for use of a car. So we say to you that the Union Pacific's position is simply this: Here is an accident that we could not possibly be said to have been negligent with respect to. We didn't own the car, we didn't furnish the car, we didn't deliver the car, we didn't control the car, we didn't know it existed. We had nothing to do with it until after the accident. Under the circumstances, it is our position that we could not possibly have been guilty of any failure to use due care with regard to a car we didn't even know existed.

(Here Paragraphs 4, 5 and 8 of the pretrial conference order of September 9, 1955, without objection, were read to the jury by Mr. Beckman as they appear on pages 52 to 55 of this record, and in connection with which Exhibit "A" to the pretrial order entitled "Wage Record of W. E. Williams Six Months ended February 10, 1953" was offered and received in evidence and read to the jury.)

[fol. 255] Exhibit A

9/8/55 — R. C. J.

Flour Mills of America, Inc.

20 West 9th at Baltimore,
Kansas City 42, Missouri,
Phone BAltimore 2000.

August 25, 1955

Wage Record of W. E. Williams

Six Months, Ending February 10, 1953

Date Paid	Amount of Payment
August 4, 1952	$ 64.83
" 11, 1952	56.47
" 18, 1952	64.50
" 25, 1952	70.71
" 31, 1952	37.49
Sept. 8, 1952	66.50
" 15, 1952	51.52
" 22, 1952	76.31
" 29, 1952	49.82
Oct. 6, 1952	49.82
" 13, 1952	49.82
" 20, 1952	63.13
" 27, 1952	49.82
Nov. 3, 1952	54.77
" 10, 1952	63.13
" 17, 1952	73.19
" 24, 1952	71.49
Dec. 1, 1952	66.50
" 8, 1952	49.82
" 15, 1952	49.82
" 22, 1952	49.82
" 29, 1952	49.82
Jan. 5, 1953	49.82
" 12, 1953	49.82
" 19, 1953	49.82
" 26, 1953	49.82
Feb. 2, 1953	63.13
" 9, 1953	49.82
" 16, 1953	22.38
	$1,613.71

[fol. 256] Bob Pyles, called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination by Mr. Beckman

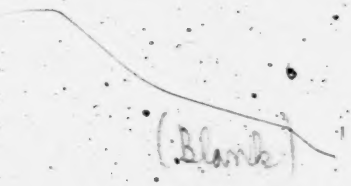
I am 26 years old, am a commercial photographer and have been for about six years. I develop my own pictures. On February 11, 1953, I took some pictures for Mr. Beckman at the Kansas Grain elevator located at 30th Street and First Avenue. I arrived there between 9:30 and 10:00, unpacked my equipment, and took pictures at Mr. Beckman's request. I used a 4 x 5 film with a speed graphic camera. We took pictures of a box car, a box car door, and some close up pictures of the box car. The door was gone on one side of this particular box car, and was laying within 40 or 50 feet on the ground. I used a panchromatic film which we use mainly outdoors because it captures the tones of the objects that you take pictures of in their true and accurate sense. The camera had a standard 137 millimeter focal length and a lens opening of 4.7. It was neither a wide angle lens nor a telephoto lens. The lens I used was a normal lens which fairly and accurately portrays the objects disputed. Plaintiff's Exhibits "B" through "L" are pictures which I took for Mr. Beckman at the Kansas Grain elevator at that time. These pictures are enlargements size 8 by 10 of the 4 by 5 films. In making the prints an Elwood enlarger was used which will give you an exact proportion in size as the negative itself. Exhibit "B" is a photograph taken with a 5 by 7 camera which I had with me and is the only picture in which I used that camera. The camera characteristics are the same as I have discussed, except it used a larger size film, 7 inches by 5. Exhibits "C" through "L" are accurate representations of the objects shown in the photographs.

(At this point, Exhibits "B" "C" "D" and "E" "B-1" "C-1" "D-1" and "E-1" were offered and received in evidence without objection. Objections of defendants to Exhibits "K", "K-1" "J" "L" "G" "H" and "F" were sustained by the court.)

[fol. 257] Plaintiff's Exhibit "B" is reproduced as follows:

(Blank)

[fol. 258] Plaintiff's Exhibit "C" is reproduced as follows:



[fol. 259] Plaintiff's Exhibit "D" is reproduced as follows:

(Blank)

[fol. 260] Plaintiff's Exhibit "E" is reproduced as follows:

(Blank)

[fol. 261] Exhibit "B-1" through "L-1", inclusive, are contact prints, or prints the exact size of the negatives, taken on February 11, 1953 at the Kansas Grain elevator. On some of plaintiff's Exhibits "B" through "L" I notice that I have done what we call cropping. Cropping is eliminating material that we think is irrelevant. In other words, it is trimming to eliminate excessive background, or a spot where it doesn't show anything. When we take a picture we are trying to take a definite object, and when you make the enlargement you make the enlargement you make the enlargement of that object.

[fol. 262] Exhibit "F-1" is the upper right hand corner of the box car door. The car door is in the bottom of the picture. Exhibit "F-1" is a picture of the upper right hand corner of the car door as I viewed it on the morning of February 11, 1953. Exhibit "G-1", as I recollect, is the box car door, and is the underneath side. It shows the upper righthand corner of the box car door in the lower left hand portion of the picture. It is a fair and accurate pictorial representation of the door as I viewed it on February 11, 1953. Exhibit "H-1" is a picture of the box car itself, and shows the upper righthand door opening and shows the rail, or hood, along the top there. Exhibit "H-1" is a fair and accurate pictorial representation of the upper righthand door opening on box car #145287 as I viewed it on the morning of February 11, 1953. The portion of the skyline, sky and background material of the door appears in Exhibit "H-1" but has been trimmed off of Exhibit "H". Exhibit "I-1" is a side view of the box car, and shows what I guess you call this channel, or hood, that I have been referring to at the top of the box car. I was probably eight or ten feet above the ground when Exhibit "I-1" was taken. I had climbed up the ladder on the side of the car and the camera was looking toward the east and about fifteen or twenty feet from the box car door opening. In preparing the enlargement Exhibit "I" I cropped out the skyline and other background that I though had nothing to do with the picture, including the end of the car where I was standing.

Exhibit "J-1" is the box car itself and shows the lower lefthand portion of the door opening as viewed from about

two feet north of the box car. Exhibit "J-1" fairly and accurately shows the objects portrayed therein. I observed [fol. 263] at the time the picture was taken that certain parts of the channel that the door is to fit in were irregular, not smooth and seemed to be broken. I remember the condition of the lower door track at that time. It was pushed down away from the flooring of the box car. It was lower than the flooring. I remember it wasn't [sng] at this point. I remember the condition of the door track at its lower lefthand corner. There was a space between the lower lefthand corner and the flooring of the box car.

As I observed the underneath side of the lower door track of Rock Island box car 145287 on the morning of February 11, 1953, near its junction with the door post at the lower righthand corner, there was quite a noticeable gap or—in the support on the underneath side, a break, there was quite a noticeable break.

That break was in the extension of the door post that came from the top of the car. I did not at that time measure the break in the door post underneath that track. Exhibit "K-2" is a photograph of the same box car that we have been referring to and it shows the lower righthand corner door opening, and also the railing upon which the box car door rides, and then the underneath portion of the box car and other supporting factors along there. The picture shows a measuring device or ruler which was not a part of the box car. Exhibit "K-1" is an enlargement of the same picture as plaintiff's Exhibit "K-2" with a small amount of cropping, but basically the same photograph. A portion of the righthand portion of the car has been cropped and some of the background material of the picture. The lower righthand corner of the door opening is fairly and accurately depicted by the exhibit. When that picture was [fol. 264] taken, I was approximately three feet from the car, facing south, and the car was facing north. That is the side with the door opening to the north. The camera was around four feet above the surface of the ground. I viewed the upper portion of the door track at its junction with the righthand door post on Rock Island car 145287

on the morning of February 11, there was a space or gap in between the door post and the junction part. There was also a gap between the siding on the car and the floor of the car. I couldn't say in distance exactly how far the gap was, but the flooring was a considerable amount lower than the siding. It didn't fit tight up against the siding. not right up snug. The lower door track on the north side of the car at its junction with the door post was considerably lower. It was sagged. It appeared to be in a sagging condition to me. I would say there was a sag of three-fourths of an inch to an inch. Exhibit "L-1" shows the portion of the car directly underneath the lower righthand corner of the box car opening—the lower door track, and is a fair and accurate pictorial representation of the objects [protrayed] therein. That morning, as I viewed it, there was a dent in the doortrack itself, and then there is an angle iron underneath the door track that has a large gap in it. This angle iron was the extension of the door post reaching from the top of the car. The lower end of that post was fastened to the floor of that car as I observed it, and the upper end was fastened to the siding.

Plaintiff offered in evidence Exhibits "F-1" through "L-1" including "K-1A" and "K-2".

Cross Examination by Mr. Kistle

The morning of February 11 there was snow on the [fol. 265] ground—it wasn't a snowy day, it was a cloudy hazy day, but a little bit chilly and bright outdoors. Exhibit "L-1" is a picture taken with a flash blub and shows the underneath side of the car with the camera pointing upwards. The light was poor for picture taking purposes on the underneath side of the car at that time, and the upper lefthand portion of the picture is brighter by reason of the use of the flash bulb. Background material, skylines and ground lines are frequently very important in orienting a picture and finding out which part is the top and which is the bottom for one thing.,

(Whereupon court was adjourned at 4:45 P.M., October 10, 1955 until 9:15 A.M. Tuesday, October 11, 1955.)

At the convening of court on Tuesday, October 11, 1955, at 9:15 A.M. the following matters occurred out of the presence of the jury.

Mr. Beckman: At this time we would like to take up the matter of plaintiff's requested admissions. We offer in evidence the request for admissions as filed by plaintiff and the admissions or the responses thereto as filed by the defendant Union Pacific Railroad Company, incorporating in answer to 22 the answer given by the Union Pacific. Also, offering into evidence the answers of the defendant Chicago & Northwestern Railway Company, and at this time moving the court to strike the answers of the defendant Chicago, Rock Island & Pacific Railroad Company under the cases under Rule 36 for the reason that they are not sworn. We feel that we are entitled to that, and that all of our requests for admissions are entitled to be admitted by that defendant.

The Court: What of the defendants Chicago & Northwestern and Union Pacific?

[fol. 266] Mr. Davis: We admitted under oath all requests for admissions that were asked for.

Mr. Anderson: That is true of the Union Pacific with one very minor qualification that is not material.

Mr. Peterson: We accept that.

Mr. Howland: The situation with respect to the defendant Rock Island is this: We were served with certain interrogatories, to some of which we filed objections and answers were made under oath as to others. Then with respect to the admissions, we made admissions which were signed by counsel, and it has not been my understanding that an admission has to be made under oath. A denial has to be made under oath, but when there is an admission made, why certainly it is in a different category than—

Mr. Beckman: It is the contention of plaintiff that all requested admissions stand admitted under Rule 36 which provides: "Each of the matters of which an admission is requested shall be deemed admitted unless within the pe-

riod designated in the request or by the court, the party to whom the request is directed serves upon the party requesting the admission (1) either a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters; or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part together with a notice of hearing the objections at the earliest practicable time".

A so-called Motion to Quash was filed in this case as to [fol. 267] certain of the requests for admissions. That was highly improper under the rules.

The Court: Was the Motion to Quash not bottomed on the thought that the requests were not relevant to the issues?

Mr. Beckman: The point about that is there was no notice of hearing given as specifically required under the rules—just a Motion to Quash.

The Court: I am willing, so far as those matters are concerned, to which the Rock Island made objections because of relevancy, whether they call it a Motion to Quash or not, I would treat it as an objection to relevancy as to those particular interrogatories.

Mr. Beckman: As to Paragraph 10 of the request, the objection is "that the same calls for a conclusion and not a fact; that defendant is willing to admit that on February 7, 1953 car RI 145287 was inspected by one Bert Neumann, an employee of this defendant and that said car was carded 'O.K. for grain loading;" that the inspection was a routine inspection not made in anticipation that the car would be applied on any particular order or any particular industry, and defendant should not be required to admit the inspection was made as the result of the orders placed on January 28 and January 29, 1953." There is no mention therein that it is irrelevant.

The Court: I shall treat the answer for the purposes [fol. 268] of this record as an admission that Neumann

did make the inspection and it was carded as satisfactory for grain loading.

Mr. Beckman: The next objections were as to Nos. 24, 25 and 26. 24 and 25 were objected to for the reason "same calls for facts occurring subsequent to the time plaintiff was injured and the car was billed over the line of the Union Pacific Railroad Company, and that the previous request show that the action taken by defendant would be [fol. 269] solely as a switching movement for interchange to the line of Union Pacific Railroad Company. There was no mention of irrelevancy or privilege as provided in the rules. And in fact no denial but what they were facts.

The next objection is as to No. 26 and defendant objects and moves to quash request No. 26 as immaterial and irrelevant; that the condition referred to was long subsequent to the time that plaintiff's injuries were sustained and that it relates to matters not germane to any issues before the court or jury. There, mention is made of relevancy. If the court should find this is such a motion as to qualify we still contend there is no notice of hearing.

The Court: Well, I am going to overrule the objection of relevancy because I am going to allow the history of that car to be shown.

Mr. Beckman: The Rock Island objected to request for admission No. 27 as to the date repairs were made by the Union Pacific but did not object to the portion reading "and thereafter transported said car to Denver, Colorado, over its own line of railroad".

Mr. Howland: Before the court announces a ruling, after ruling of the court was made in which these objections of the defendant Chicago, Rock Island and Pacific Railroad Company to specific interrogatories and to requests for admission of fact—

[fol. 270] The Court: I think we ruled on interrogatories only, did we not, out here at the hearing that we had?

Mr. Howland: At the opening of the term. I was not present.

The Court: Mr. Webster was.

Mr. Howland: Mr. Webster was at that time. And I understood that the ruling of the court was that all objections were overruled.

Now, I would like the record to show that on Friday of last week I asked Mr. Beckman in a telephone conversation if he wanted further answers made to the interrogatories and admissions as to which the court had overruled our objections, and at that time he said that in view of my request for admissions, which had been served upon him, that he didn't see that it was necessary that we file any further answers to the interrogatories or to the requests for admissions.

Mr. Beckman: Let the record show this, your honor, on a professional statement—the only inquiry made by Mr. [fol. 271] Howland in telephone conversation with counsel for the plaintiff on last Friday, would be October 7, 1955, was as to whether the plaintiff still needed the information from the answers to the interrogatories that had not been answered, and counsel for plaintiff advised counsel for the Rock Island, Mr. A. B. Howland, that there was no need for him to go to the trouble of answering the interrogatories to which he had filed objection. There was no mention made in that conversation whatsoever of the admission of facts. No mention whatsoever, and Mr.—let the record further show that Mr. Webster on Monday, October 3, 1955, stated that further answers would be forthcoming and it would appear to be necessary to the remainder of the admissions that had not been responded to by the admission of facts filed by the defendant Chicago, Rock Island & Pacific Railroad Company. That was the sole inquiry made on Friday, October 7, your honor.

Mr. Howland: Definitely there was discussion as to whether there was need for filing anything further on behalf of the Rock Island in view of the request for admissions which I had directed to the plaintiff's counsel.

Mr. Beckman: The sole inquiry was as to interrogatories; there was no mention of request for admissions. I

had no need for any further information. My case was ready for trial, and I didn't want to have to go to the trouble to try and bother to answer any interrogatories.

The Court: Well, let me say this, that plaintiff is entitled to have the objection to the admissions made by the —the response to the request for admissions made by the [fol. 272] Rock Island sustained, because under Rule 36 you are required to file a sworn statement, unless you object to any request for admissions because of the matter of relevancy. And they are deemed admitted in the absence of the filing of a signed sworn statement. That is in the rule. That is a benefit to which any party is entitled, so that he will have the benefit of a sworn statement; and I am not going to attempt to resolve any difference in the conversations you may have had because I just take the rule as I find it, and the record discloses that the request for admissions were served by the plaintiff on the R--k Island and on the other lines, I believe, on September 20, 1955, and that your answers were filed along with these objections, or this Motion to Quash, and so forth, I believe on the 28th I am quite sure that was the date. Yes. So I shall have to sustain his objections to your request for admissions, and treat his requests as admitted, except those as to which I have just ruled in respect of the matter of relevancy.

The Court: I may not modify the terms of Rule 36. That rule requires that you file a sworn statement in response. You have failed to do so, and the statement by counsel is not a substitute for the sworn statement. I consider those matters relevant about which he inquired for the reason that I have said that I am going to inquire into the whole handling of this car.

Mr. Howland: If the court, please, my understanding of the ruling made on October 3 was that all objections were overruled with the privilege to the defendants to object at the time that the request for admissions as to those matters, and the answers to the interrogatories were offered in evidence.

The Court: As to answers to interrogatories, and it is that that I recall that we discussed at that time, not the requests for admissions.

[fol. 273 Mr. Anderson: I think it is quite clear to me at least that the defendant Rock Island Motion to Quash was overruled, and the defendant Rock Island was ordered to answer—and you used the expression "pronto" — those admissions. Now that was the ruling of the court.

As to the matter of objecting at the time of the offering of the admission, the court said, in accordance with the rule, that at that time a person would have a right to make his objection on the ground of materiality or relevancy.

The Court: No, just relevancy. I may have said materiality. If I did, I was in error.

Mr. Anderson: Well, relevancy. And that is, I am sure, the objection you are talking about making at the trial. I am quite sure that is the way—is that correct, Frank, do you remember?

Mr. Davis: That is the way I recall it.

Mr. Webster: That, your honor, is the way I recall it, also, as of October 3rd.

The Court: And then did you file the additional—

Mr. Webster: No. My understanding following that was that Mr. Howland discussed it with Mr. Beckman. That is the last I knew about it, was the telephone conversation that has been referred to. Now the effect of that, it is admitted if it is overruled now again, and was at that time, and nothing further has been filed.

[fol. 274] Mr. Beckman. The failure of the defendant Chicago, Rock Island & Pacific Railroad Company to file a sworn statement or proper objections prior to the expiration of ten days under the rule resulted in the court being required to treat those admissions as to the defendant Chicago, Rock Island & Pacific Railroad Company admitted.

I remember, as Mr. Anderson remembers, the Court's instruction, that they should answer the responses to the

request for admissions "pronto". I waited every morning to receive those responses. They did not come in. There was even no mention of them in the telephone conversation of Friday, October 7, 1955, and to date there has been no response filed to them. I think the plaintiff is entitled to have them treated as admitted.

The Court: Gentlemen, that will be the ruling of the court, and an exception, of course, is allowed to you.

Mr. Howland: Now, I do not wish to prolong the discussion with the court beyond what is necessary to make a fair record.

[fol. 275] At this time I desire to say to the court that it was my understanding, and I was so informed by Mr. Webster on—I think it was in a telephone conversation on Monday, September 3rd, that your honor had overruled the objections or the Motion to Quash in toto, and had directed that we answer forthwith, or at once. At that time I was engaged in the matter of the state bar examination, and I deferred preparing any further answers to the requests because I had understood that no time had been definitely fixed; and on Friday morning, October 7th, I called at Mr. Beckman's office and found him absent from the city. I returned to Des Moines on the noon train, talked to him in a telephone conversation about the matter, and I was led to believe that nothing further with respect either to admissions or interrogatories was required on the part of the defendant Chicago, Rock Island & Pacific Railroad Company.

Now, since the court ruled upon the objections and treated them as properly filed, I desire at this time to interpose the objection to the offer of any interrogatories propounded to the defendant Chicago, Rock Island & Pacific Railroad Company with respect to the handling of the car by the Union Pacific, the condition in which the Union Pacific has reported that the same was found, as immaterial and irrelevant to any issue in this case.

The Court: Are you referring now to interrogatories or requests for admissions?

Mr. Howland: I am referring to requests for admissions.

The Court: Very well.

Mr. Howland: And as relating to matters long subse-
[fol. 276] quent to the transaction, and as in no manner binding upon the defendant in this action.

That will be applied to requests for admission called for by the plaintiff, numbers 24, 25, 26 and 27, the requests for admission of fact so numbered.

The Court: Very well. The objection of counsel will be overruled. It was the court that determined at the pretrial conference—I believe I made it clear to all counsel when we had our pretrial conference in Des Moines that I wanted this case prepared for trial at this term of court, and it was agreed then that it would be tried the second week of the term because of the discovery proceedings that were in progress, and some amendment to be filed, and matters of that kind. I think Mr. Anderson asked for some added time because I had given him a shorter time, I believe, than I had some of the others. I tried to make it clear that there would be no delays. When we had the opening of the term here when I had the colloquy with Mr. Webster about the matters that have been here discussed, I made it clear that anything to be filed must be filed—Mr. Anderson says I used the word "pronto". I take it that counsel knew that that meant promptly, very promptly.

I don't recognize the right of Mr. Beckman to waive, or of counsel to agree with other counsel, because there are still other parties involved in this suit that would be affected by it.

For the reasons that I have previously stated, I consider that the requests for admissions made by the plaintiff to the defendant Rock Island will be deemed admitted, and the rulings that I have made as to 10, 24, 25, 26 and 27 will stand, and we will proceed in that order, and you will be [fol. 277] allowed an exception to all my rulings.

Mr. Beckman: I think before the jury returns, we should clarify the procedure for submitting the request for ad-

missions for fact into evidence, and presentation to the jury. We will read the request for admission of facts, the statement as appears therein, to the jury, because the admissions of facts stand in the same position as sworn evidence; and I feel that they are entitled to have the benefit of those facts as are established and avoid the necessary of calling the witness to establish those facts.

Mr. Anderson: I believe that under the rule each admission or request for admission should be offered separately and respective counsel would then have the right to make an objection into the record on the ground of materiality or relevancy under the rule.

The Court: There is no provision in the rule for objection as to materiality. As to relevancy, those are required to be made, I believe, in response to the request.

Mr. Anderson: It is my understanding that you are not required in making responses to admissions to make any objection as to materiality or [relevency] at the time you make a response, and the reason for that is this: They endeavor to get the attorneys to make these admissions to hurry the thing up and reserve for time of trial the question of whether the request was material or relevant. There are quite a number of cases that so hold.

The Court: I would be glad to have you cite them.

[fol. 278] Mr. Anderson: I will be glad to get them for you. Isn't that your understanding, Mr. Beckman?

Mr. Beckman: If it please the court, my recollection is similar to the court's, but the plaintiff is anxious that there be no error in this record. In light of that fact, the plaintiff is willing to proceed with his witnesses, afford counsel on all sides an opportunity to assist the court in producing the cases showing whether or not that is true, and that can be taken up at the start of some other session of this court.

Mr. Anderson: Couldn't we leave the matter then of offering the admissions to a later stage in the proceedings?

Mr. Beckman: We will refrain from offering the admissions until a later portion of this case.

The Court: With that understanding, then we will call the jury.

(At this point, the jury was called into the court room and the following proceedings had.)

[fol. 279] Bob Pyles recalled as a witness.

Cross Examination by Mr. Howland

Exhibit "G-1" is a contact print of the inside of the box car door, but the picture was taken with the door off the car. The door was just standing up somewhere in the vicinity of the elevator and I took the picture of it with the use of a flash bulb. The picture was taken in daylight somewhere around 10:00 or 11:00 [o'clocking] on the morning of February 11. Exhibit "L-1" was taken while I was in a kneeling position beneath Rock Island car 145287 with the shutter of my camera pointed upward at an angle from beneath the car. The upper righthand corner of the photograph Exhibit "L-1" shows some part of the building of the Kansas Grain elevator. When Exhibit "L-1" was taken the shutter of the camera was approximately one foot north of the box car. This photograph shows an "I" beam extending across a portion of the photograph vertically, and in a slightly diagonal direction. I don't know just what that is on the car. I presume that is a supporting member of the car in the frame work. I don't know whether it is that or not. The flanged portion which shows immediately adjacent to the elevator structure in the photograph represents what I have been talking about as the door track. I presume that is what the car door rolled on. That track is supported on this beam by this brace which appears to be riveted in place. The picture Exhibit "L-1" is a portion of the track shown in "J-1" extended on down this way. It would be my judgment that the portion shown in Exhibit "L-1" would be further back toward the end of [fol. 280] the car where the door would slide back, but it is the same track or portion of the car.

Mr. Howland: The defendant which I represent objects to plaintiff's Exhibits "K-2" and "K-1A" for the reason that they incorporate matters other than the car in controversy and depict matters from an argumentative standpoint, further as immaterial and irrelevant and no proper foundation laid for the introduction of those exhibits. With respect to the photographs referred to as "G-1", "H-1" and "L-1", the defendant Rock Island objects that they do not clearly depict the situation as testified to by witness, no proper foundation has been laid, immaterial and irrelevant.

The Court: Sustained as to Exhibits "K-2" and "K-1A"; overruled as to "G-1", "H-1", "J-1" and "L-1".

Exhibits "F-1" and "I-1" were received in evidence without objection.

[fol. 281] Plaintiff's Exhibit "F-1" is reproduced as follows: M.J.D. 10-10-55

(Blank)

[fol. 282] Plaintiff's Exhibit "I-1" is reproduced as follows: M.J.D. 10-10-55

(Blank)

[fol. 283] Plaintiff's Exhibit "G-1" is reproduced as follows: M.J.D. 10-10-55

(Blank)

[fol. 284] Plaintiff's Exhibit "H-1" is reproduced as follows: M.J.D. 10-10-55

[fol. 285] Plaintiff's Exhibit "J-1" is reproduced as follows: M.J.D. 10-10-55

[fol. 286] Plaintiff's Exhibit "L-1" is reproduced as follows: M.J.D. 10-10-55

(Blank)

[fol. 287] "I have never had any experience in the construction of railroad box cars. I was not requested to go down to the elevator for the purpose of making an inspection of those box cars. I went there to take some photographs and those are the photographs that I have produced here. I made some additional exposures down there, perhaps three or four more pictures than have been identified here. I don't know whether those additional photographs were taken with or without flash bulbs. Without checking then, I cannot say. I have no contact prints of any other photographs taken there at that time.

I have never had anything to do with the construction or use of railroad box cars.

Mr. Howland: Now, if the court please, we move at this [fol. 288] time to strike the testimony of the witness Pyles given on direct examination concerning Exhibits "K-1A" and "K-2" and with respect to Exhibits "J-1" and "L-1" as to the existence of any sagging, any separation of different portions of the car's structure, as to the position of the floor of the car with respect to the condition of the car door track itself, for the reason that it now appears that the witness is not qualified; that his experience is not such as to permit him to express any competent opinion, and that the witness is not competent to testify to such matters, all of which were objected to upon direct examination.

The Court: Well, I think we excluded that portion of his testimony that was an expression of an opinion, and I think all he attempted to testify to in that respect was related to what he saw. And the jury, of course, with the examination you just made of him, knows that he was looking at it as an ordinary [observed], and they may give such weight to it as they see fit. I think they are qualified to determine what weight his testimony will receive in respect of it.

Redirect Examination.

By Mr. Beckman:

There is no distortion in any of the photographic exhibits marked for identification by the reporter and shown

to me during my testimony. The same pictures that were taken with flash bulbs could have been taken by time exposure and would have shown the same objects. The cropping did not affect the pictures in what you see nor [fol. 289] did it affect a determination of the top or bottom or the sides of these pictures. None of the enlargements are larger than the actual object as it exists.

Mary Ann Sorenson, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I am the medical record librarian at the Jennie Edmundson Hospital in Council Bluffs. In that capacity, I have custody of the hospital records of W. E. Williams, who entered the hospital on February 10, 1953. Exhibit "M" is the medical record of Mr. W. E. Williams while in the hospital and Exhibit "N" is the hospital record. The two exhibits together contain all of the hospital records pertaining to the case of W. E. Williams on and after February 10, 1953.

[fol. 290] (Exhibits "M" and "N" offered and received in evidence without objection.)

Dr. Edward Manning Limbert, called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

By Mr. Beckman:

I am 45 years of age and am a physician and surgeon associated with the Council Bluffs Clinic. I have lived in Council Bluffs since January, 1940. I am a graduate of Toronto Medical School, Toronto, Ontario, served one year internship in the Toronto General Hospital ending June 30, 1935; engaged in the general practice of medicine until October 31, 1936, at which time I joined the Mayo Clinic, as a Fellow in Surgery, and remained there for a period of three years and three months. During that time I received the degree of Master of Science in Surgery. I

have been in the general practice of surgery since January 1940, with the exception of the war years during which I was with the U. S. Third Army in Europe as Chief Surgeon of a portable surgical unit. I specialize in general surgery and am a member of the local, state and American Medical Associations, and a Fellow of the American College of Surgeons.

I was notified about 5:00 o'clock on February 10, 1953 that Mr. Williams had been injured and was then in the X-ray Department of the Jennie Edmundson Hospital. I sent my associate, Dr. George Pester, now my partner, to attend him. Dr. Pester is a surgeon also. I first saw Mr. Williams as a patient on the morning of February 11. At that time, Mr. Williams was lying on his back in bed, the small of his back being supported by a tightly rolled blanket so as to make a wad about eight inches or so in diameter, so as to arch the middle of his back off the bed. [fol. 291] His right leg was lashed into a pillow by a canvas bag which went around it several times. The pillow makes an excellent first aid splint. He had a temperature of 98.2 which is normal, and a pulse rate of 88, which is a bit fast. He was in the process of vomiting his breakfast at that time. The patient was in pain at the time I observed him. He had received a quarter grain of morphine by hypo that morning. The nurses' notes indicated that the patient stated he felt better at 10:00 A. M. Between his admission at 5:15 P. M. on February 10, and 1:00 P. M. the following day he received five hypodermics, each containing a quarter grain of morphine. That would indicate a great deal of pain. The average patient being prepared for a surgical operation may receive one-sixth grain of morphine, and that is the usual post operative dose. When needed the dosage is increased and spaced. I don't feel that this relatively large dose of morphine was enough to completely control his pain.

On February 11, 1953, Mr. Williams had lacerations of the forehead and abrasions of his knees. He had a visible break in both bones of his right leg between the knee and ankle, which could be determined without any x-rays, and he was unable to move his back. X-rays showed compression fractures of the 10th thoracic vertebra and the second

and fourth lumbar vertebra. He also had a broken upper left central incisor tooth. The fractured vertebra is what is commonly known as a broken back. A compression fracture means the individual vertebra is compressed from above downward so that it is not as tall as it was. Compression refers to a squashing or crushing of the bone.

After looking at Mr. Williams and examining him, we [fol. 292] went to the x-ray department and went over his films. I agreed with Dr. Pester that we better just let him lie there for awhile until we could see whether he had further injuries. It takes some time to determine whether there are internal injuries and whether or not delayed shock may develop. Whether or not he could even tolerate the treatment we proposed for him. At this time, the broken leg was a very minor thing. We were then concerned with the crushing injury to his spine and so we felt it would be wise to defer any definite treatment of the broken leg for possibly a week or even two weeks. The deformity of the bone was visible under the skin of the patient and you could see the broken ends projecting forward, and the position of his leg and foot showed the presence of fractures of bones.

In my practice as a surgeon, I have examined tens of thousands of x-rays. X-ray pictures were taken from time to time of Mr. Williams: The first on February 10, 1953 and the last, last Friday. I have these x-rays with me. I have an x-ray view box here to use in examining the films. Exhibit "O" is a fair and accurate x-ray picture of Mr. Williams' right leg at the time I first saw him. The plate is put down between his legs and the x-ray is taken horizontally, and you can see here distinctly an oblique fracture involving the small bone known as the fibula, and an oblique fracture involving the larger bone which we call the tibia. This other film is taken with the plate underneath the leg and the x-ray coming down from above to below, showing again the fractures of both bones. Plaintiff's Exhibit "O" is a fair and accurate pictorial representation of the condition of the bones of the right leg of W. E. Williams at the time I first saw him. It does

[fol. 293] not, however, represent the condition of the bone at the time he was first seen on the x-ray able. The foot has been supported by a temporary splint, and at the time these x-rays were taken it was being held in approximately its normal position. Before taking the picture marked Plaintiff's Exhibit "O", the bones would be projecting upward through the skin. The angle at this point was considerable; the bone was sticking up under the skin here and the foot was rotated outward—a completely unnatural position. There had been a partial reduction of the fracture before the x-ray picture was taken.

Plaintiff's Exhibit "O-1" is a lateral x-ray of Mr. Williams' spine taken with him lying on his back. It shows the dorsal vertebrae and the lumbar vertebrae below. You will observe that a vertebra is a bone of various sizes and averages about two and one-half inches around and usually from three-quarters of an inch to a little better than an inch in thickness. It has these other processes on the back which serve to connect each one with its neighbor and form an arch which surrounds the spinal cord. These bones are separated, each from its neighbor, by a cushion which is made of fibrous and cartilage material that is constructed somewhat after the manner of a golf ball. That is, the outer parts of this cushion are circular and quite tough and fibrous, and the center part becomes more and more near like a jelly. These are the things that relax while you sleep so that when you get up in the morning you are actually taller than when you go to bed at night. They serve as a cushion to prevent the top of your head from being injured by the action of walking. They also provide for a certain amount of flexibility. The bones do not glide [fol. 294] over one another. They merely have a flexible cushion in between them. In Exhibit "O-1" you can see that the 1th dorsal vertebra is shortened from above to below. The vertebrae have been defined as a row of bones. Your head sits on one end and you sit on the other. The bones which go to make up the neck are called cervical vertebrae. The ones to which ribs are attached are called thoracic or dorsal. Below the dorsal vertebrae come usually

five lumbar vertebrae in the lumbar region. Below that there is the sacrum which is made up of five or six or more vertebrae which are fused together to form one solid bone. Exhibits "O-1", "O-2" and "O-3" are all accurate x-ray representations of the condition of the bones taken on February 10, 1953.

(Exhibits "O", "O-1", "O-2" and "O-3" were offered in evidence on behalf of the plaintiff and received without objection.)

There are generally five lumbar vertebrae and twelve dorsal vertebrae. Vertebrae are numbered from above downward. Exhibit "O-1" shows that the 10th dorsal vertebrae is shortened from above downward so that the upper surface of the one below it comes at an angle. In other words, it is wedged. It has been crushed down. The front edge of it does not measure nearly as great as that of its neighbors. There is some question as to whether or not there is an associated injury of the 11th dorsal vertebra at that time. Coming on down to lumbar vertebrae one and two you might argue a little bit about this, but I believe that I see in this vertebra a distortion, the front of which is usually a smooth concave line. This one is not. It has a sharp break in it which indicates to me some break. It is shortened from above downward, It is shorter than the one above it and the one below it. The same is true [fol. 295] of "L-4".

Plaintiff's Exhibit "O-2" shows very clearly the wedging of the 10th dorsal vertebra. It shows a measurable wedging of the second lumbar vertebra, a lesser wedging, but still some and also what I take to be and interpret as a wedging of lumbar 4. This would indicate that Mr. Williams' back was broken in three places. Exhibit "O-3" is an anterior-posterior film which means a front to back shot of Mr. Williams' spine, including his sacrum, his lumbar vertebrae and a view of the lower dorsal vertebrae. You [fol. 296] don't really demonstrate fractures at all well with an anterior-posterior picture of the spine, although this Exhibit "O-3" confirms the observations we make from the lateral film.

Immediately after Mr. Williams' injuries there wasn't much of anything to do but wait. Five or six days later Williams was still getting hypodermics for his initial injury. For instance on Wednesday, February 11, he received four quarter grains of morphine. On Thursday three. On Friday he received one quarter grain of morphine and a grain of codeine by hypodermic. On Saturday he was twice given a grain of codeine by hypo. On Sunday he was given a grain of codeine once. Once on Monday, and on Tuesday, February 17, a week from the time of his injury he was given a grain of codeine at 1 o'clock in the morning for pain. On the morning of February 17 a four inch incision was made on the front surface of Mr. Williams' right leg over the fracture site, and the skin and tissues down to the bone were reflected back; the broken ends of the bone were then manipulated by twisting and pulling the foot until the fractured surfaces lay in contact with one another, and then an instrument which we call a bone holding forceps was applied to the broken ends so as to hold them in the position in which we wanted them while two holes were drilled and two stainless steel screws were inserted. They were either stainless steel or vitallium. He still has those screws in his leg and will continue to have them always. The skin wound was closed with the usual silk sutures and a plaster cast was applied from his toes to well above his right knee with the knee slightly bent. Nothing was done with the fibula because by the time we got the tibia in place the fibula looked pretty good, so we didn't have to worry about it.

After that the patient was placed on a fracture table which has a contrivance which arches the back rather sharply, and we arranged for his back to be so arched by suspending him on a canvas sling and with the legs drawn [fol. 297] up into the air with him on his face so that the lumbar portion of his back arched as sharply as possible, and then a padded plaster cast was applied from the base of his neck down to the pubic bone. Mr. Williams was under a deep general anesthesia during all of this. He left his bed to go to the operating room at 7:40 A.M. and was delivered back at 10:50 A.M. All he had to do then was to grow some bones and all we had to do was keep him alive until he did. Williams was given one sixth of a grain of

morphine before going to surgery and on his return from surgery was given glucose in water in the vein. At 4:00 he complained of pain in his back and shortly thereafter was given one sixth grain of morphine. He required another hypodermic at 11:00 that night. He had some sedation until after Friday, February 20. At that time he had come along to the point where he was able to be up in a wheel chair for forty-five minutes a day. During this time his body was completely encased in a plaster cast with his back sharply arched. He was turned about once an hour to change his position a little bit. His entire torso was encased in this plaster cast and his body would be resting on the padded inner surface of the cast which doesn't make them much more comfortable.

Everything went along beautifully with Mr. Williams until Thursday, February 26, and at that time during the [afternnon] he complained of pain in his chest or jaw, which progressed through the afternoon into his neck and upper chest, and shortly after 4 o'clock he had pain which was increased by taking a deep breath and coughed up some blood and blood stained mucous. A diagnosis of pulmonary embolism was made at once. When an individual has something which may cause a blood clot to form in a vein—such as a fractured bone—a blood clot may reach the lung. In this case there was in increase in the pulse rate, a rise in the temperature and Dr. Jorenson, a specialist in internal [fol. 298] medicine was called in. A pulmonary embolism is exceedingly painful. The fact that it occurs at all indicates that there is a source for more blood clots. These clots break off from the place they have formed in the veins and float along in the bloodsteam with fair speed, go through the right side of the heart and out in the arteries to the lungs, and may be large enough to completely block the circulation to the lung. If you block the circulation to merely a large part of one lung there is immediately an associated spasm of all blood vessels in the area which ends the individual's life in a matter of a few minutes.

Mr. Williams was put back to bed and told not to move. He was immediately given an intravenous injection of heparin, a substance which tends to reduce the clotting power of blood. He was given daily doses of dicumarol, another

drug which reduces the clotting power of the blood. This serious condition and threat existed until March 22. There was no evidence of any threat of pulmonary embolism after that date.

About five days before leaving the hospital on April 18, 1953, Mr. Williams was taken to surgery and the cast on his leg was removed and the stitches were removed from the wound. X-rays were then taken of the leg and a new cast applied from the toes to above the knee. The body cast was left on. X-ray pictures were taken on February 20 of his left leg, but there is nothing disclosed that would have any bearing on the injuries sustained on February 10. X-rays were taken on February 23 of both the spine and the leg. On February 23 x-rays of the right lower leg and of the lower dorsal and upper lumbar spine were taken. Exhibit "O-4" is the x-ray of Mr. Williams' right lower leg taken February 23, 1953. Exhibit "O-5" is a lateral x-ray of the spine of Mr. Williams taken February 23, 1953 through a plaster cast. Exhibit "O-6" is an anterior-posterior film of Mr. Williams taken February 23, centered at the first lumbar vertebra, and taken through a plaster cast. [fol. 299] Exhibit "O-7" is an anterior-posterior x-ray of the dorsal and upper lumbar spine taken on February 23 through a plaster cast.

(Exhibits "O-4", "O-5", "O-6" and "O-7" were offered and received in evidence.)

Exhibit "O-5" shows the 10th dorsal vertebra with a visible gap in the front of it where the fracture has been opened out by extending the spine. You can't make out much of the details of the others, except to say that the alignment and spacing look satisfactory. The pictures were taken through two layers of plaster, each over one-half inch thick. The purpose of taking x-rays at this stage was just to see if we had him in about the right position. Exhibit "O-4" shows the fracture of the tibia in pretty good alignment. The bones are within one-sixteenth of an inch of one another and satisfactory union will occur there. You can also say that the ankle joint is in satisfactory alignment.

(At this point recess was taken from 12 o'clock noon until 1:45 P.M. of the same date and reconvened pursuant to adjournment.)

Examination of Dr. Limbert continued as follows:

Exhibit "O-8" is an x-ray of Mr. Williams' right leg taken April 18, 1953. It shows the fracture essentially in the same position as the previous film with practically no evidence of bony union. Mr. Williams left the hospital on April 22, 1953, in an ambulance on a litter. I next saw the patient when he was brought back to the hospital on May 25, 1953 in an ambulance on a stretcher. On May 25 the casts were removed and x-rays were taken of the back and leg. He was admitted to the hospital for an overnight stay. Exhibit "O-9" is a lateral x-ray of his lower lumbar vertebrae and sacrum taken on May 25, 1953. All it shows is the erosion of the upper anterior margin of the 4th lumbar vertebra which was present in the previous films. There seems to be a little more bone shown than in the x-rays taken on [fol. 300] February 11. Otherwise it doesn't show anything new. Exhibit "O-10" is an x-ray picture of Mr. Williams' right leg taken May 25, 1953. It shows some evidence of new bone formation. Exhibit "O-11" is an anterior-posterior view of Mr. Williams' dorsal spine taken May 25, 1953. That shows quite clearly that the 10th dorsal vertebra has been squashed to approximately two-thirds of its previous depth. You can't say from that film whether or not there has been any improvement. All we can say is that the position has been well maintained and assume that it is uniting satisfactorily. Exhibit "O-12" is a view of Mr. Williams' lumbar spine including at least one of the lower dorsal vertebra, and his sacrum, taken May 25, 1953. The alignment seems normal, otherwise you can't tell much from this x-ray. Exhibit "O-13" is a lateral x-ray of the lower dorsal spine taken the same date which shows quite clearly the compression of the 10th dorsal vertebra. There is also some loss of spacing between the 9th and 10th and the 10th and 11th dorsals. There is obviously some damage to the cartilage and there is less room for the cushioning effect of the cartilage between the vertebrae.

Exhibit "O-13" shows the beginning of a bridge forming between the 11th and 12th dorsal vertebrae just begin-

ning to be visible. The patient is getting a deposit of calcium crossing the cartilage space. Exhibit "O-5" shows a little bit of a break between 11 and 12 so I think we have to assume that this is a pre-existing defect. A man of Mr. Williams' age isn't developing bony structure. He has it already. In as much as this man has squashed three vertebrae I think that an injury such as Mr. Williams sustained might have some effect on the development of the bony structure. Exhibit "O-14" shows the fourth lumbar vertebrae just slightly wedged and shows that it has at some time in the past had a crushing injury. There is no evidence that that is recent, and by that I mean particularly after February 10, 1953. Mr. Williams was discharged from the hospital on the 27th of May. On the morning of May 26 an unpadded plaster cast was applied to his right leg from his toes to his knee and a so-called Strickler [fol. 301] heel was applied to the cast so that he could walk, bearing weight on the injured leg.

On July 31, 1953, Mr. Williams came to the hospital and the walking cast was removed. On June 30 an x-ray photograph marked Exhibit "O-15" was taken. The exhibit shows the position of the bones unchanged and apparently bony union is progressing, but the fracture lines are still visible in the x-ray. On July 31 an x-ray of Mr. Williams' right leg was taken after removal of the cast. It is Exhibit "O-16". It shows that the fracture line is almost obliterated and some new bone has formed. I next saw Mr. Williams in my office on August 29, 1953. At that time he still had some swelling of his right ankle and was walking with a cane. He complained that his back was stiff. I next saw Williams on September 28, 1953. At that time he was walking without a cane, but with a slight limp and complained that his foot and back ached if he was up for a while. The calf of the right leg was one inch smaller in circumference than the left. Where a leg or an arm, or any part is not used the muscular part shrinks. Anyone who has had a part immobilized in plaster for a good long time is going to have some aching and pain in it after use until he finally gets the muscles back to their normal tone and strength.

I next saw Williams on October 26, 1953, and made a note at that date reading, "Can walk two miles. Gets a backache after about one mile. Obviously improving." On November 23 Mr. Williams was at the office and stated that he was able to be up almost all day. He was still having some pain and swelling of his right foot and ankle and aching in his back. On December 29, 1953, Mr. Williams came to the office. He complained of pain around the inside of his right ankle which was made worse with activity. Additional x-rays were taken, not previously identified, on July 31, 1953. They are identified as Exhibits "O-17" and "O-18". Exhibit "O-17" is a lateral x-ray of the lumbar spine. It doesn't show any significant change over previous films. The fourth lumbar vertebra [fol. 302] looks just the same as it did in the earlier ones. Exhibit "O-18" is an x-ray of the lower dorsal and upper lumbar vertebra taken July 31. That x-ray shows marked wedging of the 10th dorsal vertebra and the corresponding narrowing of the interspace between the 10th and 11th dorsal vertebrae. The narrowing and wedging in an individual whose muscles are normal doesn't have any effect, but with an individual who has been disabled he would have pain as a result of that condition. Exhibit "O-19" is an anterior-posterior film of the lower dorsal and lumbar spine taken the same day. It shows the same crushing of the 10th dorsal vertebra.

Exhibit "O-20" shows anterior-posterior and lateral views of Mr. Williams right ankle taken December 29, 1953. It shows a loss of the normal bone markings in the lower end of the tibia and fibula. The bones there have a sort of ground glass appearance, which is evidence to me that he is losing the calcium from the bones of the foot. I considered that to be an explanation of why his foot was bothering him so much. Any part which is immobilized for any reason and not used tends to lose something of its substance. Loss of calcium following an injury in people past the half century mark is not uncommon. I would say that condition is attributable to the injury received on February 10, 1953. Mr. Williams was advised to eat a diet high in protein and calcium, and was given injections of a substance to promote the deposit of calcium in the bones. I would say that Mr. Williams was still totally and com-

pletely disabled as of that date. Mr. Williams came in pretty often to get these injections. He was there on January 5, 12, 19 and January 26, 1954. The foot was better at that time but he complained of aching in the muscles of the lumbar area of his back. I saw him on February 2, 9, 16, 23 and March 2, 9, 16, 23 and 30 and on April 6, 1954. On April 6 and 13 note was made that he was improving and the soreness much less. I saw him on April 20, 27, May 3, 11 and 18, 1954. He stated that his foot was painful in damp weather. I think Mr. Williams continued to improve all through 1954 until about the middle of November, then [fol. 303] by December it was evident that he was not improving as fast as he should have been. At that time, x-rays were taken which showed a complicating factor which is usually slow in becoming evident and which required treatment for another four or five months. Mr. Williams had a total of twenty of these injections made with a needle. My June 8, 1954, I thought Mr. Williams was almost ready for light work. On June 28, we ended his total disability officially.

Based on my experience and training and my general knowledge of Mr. Williams' injury and the work that he was doing I would say that he is still totally and permanently disabled from doing the type of work that he was doing on February 10, 1953. He is now totally and permanently disabled as far as heavy work is concerned and that will be true for the rest of his life. I saw Mr. Williams on August 31, 1954. The next time I saw him was October 6, 1955. At that time, x-ray photographs were taken. His blood pressure was elevated, with systolic pressure of 220 millimeters and diastolic of 100. There are no physical abnormalities of the heart, lungs and abdomen. The left leg was one-half inch shorter than the right. The movements of the ankle were normal in range. His back flexion was limited in that bending forward without bending his knees, his fingertips stopped about ten inches off the floor. There was limited extension and lateral bending in the spine. There was a visible curvature of his spine to the right in the lumbar area.

X-rays were taken on October 6 and 7. Exhibit "O-21" is a true and correct pictorial representation of the bones

in the right leg of plaintiff W. E. Williams as of October 7, 1955.

Just modestly, I think Exhibit "O-21" shows a honey of a result. The fracture lines have vanished. The bone [fol. 304] structure is almost completely normal. The screws are visible imbedded in the bone. The normal bone markings have returned and the bone density is again approximately normal. You can see that the fibula is somewhat thickened and there is some thickening of the tibia at the level where the fracture was, but it looks like a pretty good leg.

Exhibit "O-22" is a lateral x-ray taken of Mr. Williams' lower dorsal and lumbar spine on October 7, 1955. This shows a visible compression deformity of the 10th dorsal vertebra. The 11th dorsal and the 4th lumbar vertebrae. There is marked bridging between the 10th and 11th dorsal vertebrae and marked loss of normal spacing between them. The bridging that was previously demonstrated between the 11th and 12th dorsal vertebrae is practically unaltered. The 4th lumbar vertebra shows some compression deformity with some lipping of its anterior margin. The compression fracture of D-10 and D-11 produces an increased forward bowing of the spine at that point which throws additional strain on the muscles supporting the spine and I expect produces—would produce fatigue and pain. I do not believe that the change in the 4th lumbar would cause any symptoms at all. The compression fracture of the dorsal vertebrae is a permanent condition that will exist the rest of his life. The only other evidence of developments in the picture is there seems to be an increasing bony prominence on the front of the 4th lumbar vertebra which shows a little bit of a spur there. The joint between the two vertebrae is undergoing marked changes accompanied by calcium deposits. That is traumatic arthritis. Arthritis is a term applied to anything wrong with a joint and traumatic arthritis refers to things which go wrong with a joint which has been injured. This joint has been injured and nature is attempting to solidify this joint so that the damage that has been done will not progress. This is getting progressively better. This damage has been done but this joint [fol. 305] is getting solid. The vertebrae are fusing. The

back is permanently flexed a little bit at that point. Normally there is some flexion and that normal flexion is increased which alters the posture, and posture changes are going to produce fatigue much more rapidly than in the normal case. He is probably going to continue to have pain in that part of his back, after attempting heavy work, for the rest of his life. I would say that Mr. Williams can never go back to his old job, but is capable of doing light work, not involving heavy lifting. I don't believe there will be any improvement in Mr. Williams' back condition. I think he will sustain pain from the injuries received on February 10, 1953 if he attempts heavy work. I think every time the weather changes he has a permanent barometer, and is going to get stiff when we have a storm coming.

X-ray Exhibits "O-8" through "O-22" were offered and admitted in evidence without objection.

Cross Examination by Mr. Howland

I do not consider arthritis as a disease of the body. It is merely a basket term into which we throw hundreds, or thousands, of diseases. There are hundreds, or possibly thousands, of types of arthritis. In general, I think most people of 55 or 60 have some degree of arthritis which is revealed by x-ray examination. The bridging between the vertebrae that I referred to that was shown on the February 11, 1953 x-rays was an indication of arthritic deposits. It is true that Mr. Williams at the time he was injured had arthritis present in his spine.

The degree of recovery of any individual who suffers an injury depends upon the mental attitude of the patient to some extent. The structure of the spine is not ivory hard. [fol. 306] The vertebrae have cavities for the passage of blood vessels. It is, to some extent, porous, and it can be crushed. When you have a compression fracture, there is a squeezing together rather than a fragmentation of the body of the vertebrae. That is what a compression fracture means. If you are able to reduce that compression and get the thing back in its normal alignment, you see that it is [fol. 307] fragmented. The progress of recovery from a compression fracture is more in the nature of an expand-

ing, and a returning to normal appearance if you can get the fracture back, which isn't always possible. If the fracture is reduced nature goes through a [a] stretching of the vertebrae to occupy the normal position.

I am very happy with the result of the treatment of this patient so far as his leg is concerned. I would not say the result was far above average, but I would say considering the severity of the injuries the patient has made a good recovery so far as his leg is concerned. Mr. Williams had bridging between the 11th and 12th dorsal vertebrae, between the 12th dorsal and 1st lumbar, and between the 1st and 2nd lumbar vertebrae at the time of his original injury. As a matter of fact, in this particular case that bridging hasn't developed any further. The bridging that I referred to was between the 10th and 11th dorsal vertebrae and the result is that it fuses the two adjacent vertebrae making the spine more rigid. It has a tendency to immobilize the spine at that particular joint. As far as the x-ray picture "O-22", which was taken on October 7, 1955, is concerned there is no difference between that and the initial film as far as the 4th lumbar vertebra. As far as the 4th lumbar is concerned I would say forget it. There is no change.

Dr. Jorenson, who was called in consultation during the period that the pulmonary embolism was giving trouble, is an associate of mine in the Council Bluffs Clinic; he is an internist, or specialist in internal medicine. I am a general surgeon, not an orthopedic specialist as such, but I handle both orthopedic and general surgery as well. An embolism is a blood clot, or, in people who have fractures, it may be a loose piece of fat that forms somewhere in the veins of the body and gets loose and starts traveling around in the blood stream. The embolus in Mr. Williams' case may [fol. 308] have been the result of the operation which was made necessary to get at the fracture of the leg. There was no recurrence after the one experienc in Mr. Williams' case. The embolism cleared up without any further difficulties after that one experience.

Considering the severity of the injuries that were apparent on Mr. Williams' admission to the hospital, I would

say he has made a good recovery and that through my knowledge and skill and the treatment given by my associates and myself that he is employable for anything except heavy work. It is true that on October 14, 1953 I wrote a letter saying: "I believe that Mr. Williams may be ready for light work in a month or two and will probably be ready by the end of the year. I do not expect any permanent disability". That was the opinion which I had and which I expressed on October 14, 1953.

Now, what has occured in the interim between October 14, 1953 and October 11, 1955 that has led to a change of the opinion which I expressed on that date is this: When I saw him on October 26, and at that time we made a favorable report to an insurance company, too, and on the 23rd of November, 1953, I stated he was able to be up almost all day. He was advised to begin light work around the house. On December 29 it was evident that he was not improving and if anything was getting worse.

By December, 1953, all danger from the suspected embolism had passed. The condition disclosed by the x-ray where I said there was evidence of loss of some mineral or a change in the condition of the bony appearance of the x-ray, that also yielded after the medication which he was given. After these twenty different shots of medication [fol. 309] for the correction of that condition it cleared up in pretty good shape. I do not consider fusing of the vertebrae at the site of a fracture a desirable thing. When I said that Mr. Williams' total disability ended on June 28, 1954, I meant that I felt he was ready for light work as of that date. I reported to the insurance company that I considered he was ready for light work as of June 30. It is still my opinion up to October, 1955, that the plaintiff is ready for light work.

Redirect Examination

Exhibit "O-23" is an anterior-posterior x-ray of the lower dorsal and lumbar spine of Mr. Williams taken October 7, 1953. It shows the spine is approximately straight with a slight convexity to the right. There is some compression of the 10th dorsal vertebra. There are a few

arthritic changes that are visible in the other films. Fusion of the vertebrae takes place when bony processes grow across the space occupied by the intervertebral disc so that there is no longer any movement which takes place between the vertebrae. By the intervertebral disc, I mean the disc that exists between each two vertebrae. The intervertebral disc between the 10th and 11th dorsal vertebrae shows severe damage and the bridging is an attempt to support the joint since the disc is no longer performing its proper function.

The letter that was referred to which I wrote in October, 1953, was addressed to Mr. W. W. Campbell, Claim Agent, for the Rock Island Railroad. He made inquiry of me concerning Mr. Williams' condition. On cross examination, I said that Mr. Williams had made a good recovery. By that, I mean he didn't die of his injuries, and is still with us. His leg is about as good a result as you can get. No [fol. 310] leg that has been broken is ever quite normal, but it is a good one and he has permanent back weakness; a fractured vertebra can cause total [paralsis] from that level down, and his did not. He is capable of light work. I think he is a very fortunate man. I did not state or intend to infer that he has returned to normal, as he was prior to his injuries on February 10, 1953.

Exhibit "O-23" was offered and received in evidence without objection.

Recross Examination

A blood pressure of 220 over 100 is above normal and is sometimes referred to as hypertension. Mr. Williams' blood pressure the evening after his admission to the hospital was 152 over 80. When he went to surgery for repair of the fractured tibia it was 150 over 70. It had dropped at the end of the operation which is a normal reaction to surgical treatment. Elevated blood pressure is not attributable to traumatic injury. I wouldn't make a diagnosis of hypertension on one reading; I only made one reading in the past year. At the time of my last examination of Mr. Williams, no laboratory tests were taken. There was no urinalysis, no blood count, no white count, no hemoglobin

test, no red count. Arthritis is sometimes due, or at least certain forms of arthritis, to a focus of infection somewhere in the body of the patient. If an examination of this patient revealed an elevated white cell count and microscopic examination of the urine revealed thirty to thirty-five pus cells per field, with a sedimentation rate of 45 millograms per hour, I would say that the patient had a urinary infection. I would not say that a urinary infection is fre- [fol. 311] quently the cause of arthritis, or an aggravation of pre-existing arthritis, but it may be.

Dr. Russell W. Blanchard, called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination by Mr. Beckman

I am an M.D., specializing in radiology. I graduated from the University of Iowa Medical School in June, 1941, with a medical degree; took a year's internship at the Good Samaritan Hospital in Portland, Oregon. Took four years of training in radiology at the St. Louis City Hospital in St. Louis, Missouri under Dr. Santee, who is an internationally known radiologist; finished my training and in July, 1946 came to Council Bluffs where I established an office at the Jennie Edmundson Hospital and have been there ever since as the radiologist. I am a member of the Pottawattamie County, Iowa State and American Medical Associations, and am past president of the Iowa Radiological Society. I took an examination and was certified by the Board of Radiology as a specialist in radiology in 1947. A radiologist is a medical doctor who takes, or causes x-rays to be taken, which he in turn interprets as to what they may show and what the diagnosis may be, or how they may help in diagnosis of the particular case. He also prescribes and administers treatment with x-ray, radium or any of the other radiation types of medicine.

I have studied the x-ray exhibits "O" through "O-23". All of them were taken under my supervision at the Jennie Edmundson Hospital. From the x-ray that was secured on admission of the patient on February 10, 1953, there [fol. 312] was a spiral oblique-type of fracture through

the lower third of the tibia with considerable displacement. There are two fractures of the fibula. One at the upper end which is a comminuted type of fracture, but all of the fragments are healed in excellent position. Then there is the associated fracture through the distal end of the fibula, the part near the ankle joint, which is an oblique type of fracture. In the examination of October 7, 1955, the fracture through the distal end of the fibula, the part near the ankle joint, which is an oblique type of fracture. In the examination of October 7, 1955, the fracture through the distal third of the tibia—the big bone—has healed quite satisfactorily and in good position with the metal screws that were put in at the operative procedure still being present and showing no evidence of having pulled out in any way. The fracture through the end of the fibula down near the ankle joint has also healed quite satisfactorily and it approximates the normal position.

The x-rays taken on February 10, 1953 of the lumbar and lower dorsal spine, taken from the side or lateral view show a very definite compression fracture of the 10th dorsal vertebra. The 11th dorsal vertebra is normal in size and shape. The space between the 10th and 11th is normal at this time above and below the 10th dorsal vertebra. There is some hypertrophic osteoarthritic change, or bridging, between the lower aspect of the body of the 11th and upper aspect of the body of the 12th dorsal vertebrae, and between the lower body of the 12th dorsal and the upper surface of the body of the 1st lumbar, but there was no actual bridging present between the 10th and 11th dorsal vertebrae at that time. There is a slight wedging or com- [fol. 313] pression of the front or anterior part of the body of the 2nd lumbar and a slight narrowing of the anterior part of the body of the 4th lumbar. There is an increase in the usual angle or curvature of the spine in the region of the 10th dorsal vertebra by virtue of the wedging of the compression deformity. That is shown by Exhibit "O-2". Exhibit "O-23" taken on October 7, 1955 shows essentially the same area of the spine, and we again see definite compression of the 10th dorsal vertebra with some compression or narrowing of the 11th dorsal vertebra not present at the first examination. There is definite narrowing and loss of joint space between the 10th and 11th dorsal

vertebrae which was normal to begin with in February, 1953. There is definite bony bridging of a rather marked degree between the under surface of the 10th dorsal and the upper surface of the 11th dorsal vertebra not present previously. There has been no essential change in the arthritis process. The 2nd lumbar vertebra which did show slight compression originally, with treatment has apparently been re-expanded to its relatively normal width and appears to be normal at the present time. The 4th lumbar shows a very slight narrowing, probably not too significant a narrowing, but there is still some narrowing present which was not present at the original examination. There is anterior lipping and some increase in the bony proliferation along the upper surface which was not present to that degree in February, 1953.

In the 11th dorsal vertebra and the intervertebral disc, or space, the narrowing between the 10th and 11th dorsal vertebrae and the narrowing in front of the body of 11th dorsal vertebra not present at the first examination would indicate a condition that we sometimes see, and spoken of [fol. 314] as Kimmell's disease. This was first described by a doctor named Kimmell in the years gone by, and what it amounts to is a delayed reaction, you might say, to an injury in the spine—an injury that was not severe enough at the time to cause a compression of the anterior part of that body, but was severe enough to injure the circulation to that vertebra and to that disc, so at a later date the bone begins to become softer because it does not have proper circulation and as a result the anterior part of the bone, or the front part of the bone, tends to begin to collapse. It is a progressive thing over a period of years in most instances and usually gives rise to pain. I would think that condition exists in the back of Mr. Williams at this time. I don't think any of us could really say with any accuracy as to whether the progression of that disease or injury would progress farther, or regress. More than likely, it would remain stationary or progress. I don't have an opinion by looking at the x-rays whether or not this man is totally and permanently disabled from heavy work.

Cross-Examination.

By Mr. Howland:

Arthritis and arthritic changes are brought about, among other things, by infectious processes in the system. Urinary infection somewhere in the urinary tract is considered a focus of infection, and may be a causative factor in connection with arthritic changes in the spine of a patient if it were a chronic infection. I mean one extending over a long period of time, rather than an acute thing that lasts for a week—or say something of that nature and is cleared up.

[fol. 315] William Earl Williams, called and sworn in his own behalf, testified as follows:

Direct Examination.

By Mr. Beckman:

I live at 1504 Third Avenue in the City of Council Bluffs. I am now 60 years of age and was 58 on February 10, 1953. I have four children, the oldest about 30, and the youngest 23. None of the children reside with me at present. I was employed by Kansas Grain Company on February 10, 1953 in the grain elevator at 30th Street and First Avenue in this city. First Avenue runs east and west. There is no actual street for public travel in First Avenue. There are railroad tracks located in First Avenue and it is referred to as the River Track, which are south of Kansas Grain elevator. There are three sidings that lead into the loading shed of the Kansas Grain elevator. The first track north of the main line, or River Track, is referred to as the "hold track", the second the "loading track" and the third the "unloading track". The main building of the elevator is next to the unloading track. On February 10, 1953, I had been employed by Kansas Grain Company for about two years. Before that I worked for Scoular-Bishop Grain Company. My duties at the Kansas Grain Company consisted of unloading grain with a power shovel, loading grain, closing doors, general work around there. Prior to working for Scoular-Bishop

and Kansas Grain elevators, I farmed in Pottawattamie County in Hazel Dell Township for five years. I have always managed to be employed prior to my injury; even during the depression I was never on relief.

The power shovel is made up of boards about three feet square. It operates with a pair of hooks down close to the bottom and a pair of handles on top of it, and we have [fol. 316] what we call a shive wheel just outside the door after the car is spotted into the unloading position. It runs over to a shaft overhead inside the general part of the elevator and there is a motor, of course, attached to it to pull it and an automatic clutch. There is a cable on the spool and you bring that down and run it through this shive and you hook this cable onto the power shovel and walk back through the grain with it and when you get as far back as you want to go, you have to unload as you go back, unload usually about two-thirds full in the box car. Then you set your shovel down in there and bounce it, and a few bounces at the right position and you can bring out about six to eight hundred pounds of grain at a load. The boards will weigh from 28 to 30 pounds and you have to drag this and the cable fastened to it as you wade back through the grain, and the big trick is to balance it in there so you can bring out six to eight hundred pounds at a load. Two men work on the car at the same time in unloading. One at each end. It is necessary that you work alternately back and forth in taking your loads out the door and keep going. They receive principally wheat, corn, oats and milo at the Kansas elevator. Once in a while a car of barley.

We have a car puller that we use to pull these cars in with, to place them, spot them to [lozd] the car. We have a long shaft, about an eight inch shaft with a spol in the middle, mounted on each end on a concrete block. It is about twelve feet long and eight inches in diameter. It is mounted so that it will come on even with the ground on this shive. The shive is a sixteen-inch pulley wheel, mounted on a concrete block to anchor it down, and that is so [fol. 317] that this cable that we have on this spool pulls it so that it will wind evenly on the spool. We have a motor

and a big clutch handle that comes up on the main floor. This cable on the loading track extends under the No. 3 track, the one closest to the elevator, goes under those tracks and out through this large shive wheel and then we take it back through the tracks there and place it on the car. We have a large hook on the end of the cable which will weigh about fifty pounds. The cable is usually seven-eighth-inch steel cable. When we move a car we pull the cable out and hook it on the large cross member that sets across it on the car just above the wheel.

We usually get the car puller man and give him the signal to pull the car on in after we have the cable on it. He pulls it and we spot it to where the loading spout is, and give [fol. 318] him a signal to stop. Then we block the car so there is no danger of it running away and climb up on the loading platform and put our spouts in the car. These spouts load the car by gravity feed. The scale is way up next to the top floor, and this tube is twelve inches in diameter and on the end is this spout. This spout runs through the top of the loading chute and you have a platform that you can stand on which gets you up high enough so you can swing this spout up pretty near to the ceiling of the car. On the end of the round spout we have what we call "L" forks. The purpose of this fork if you held the round spout all the way in there you have to load one end at a time. With this fork it is divided just something like a wishbone and you have to swing these forks on hinges up in the car. You put two sticks under there, notched out to hold it up there. The chute that you use, I imagine, would weigh about two hundred pounds, but you don't have to lift it. It is hanging there on a hinge. It would have to be on a hinge because you have to take it out of the car to bring your next car in.

By grain car, I mean a regular box car which has to be grain tight and everything, and in perfect order so that it will hold grain. Grain doors are used where they close the opening. The standard, I believe is twenty-four inches wide and about eight feet long to close the opening of the door. They are just one-inch boards nailed together with a cross member, and about eight feet long and twenty-four inches wide, nailed across the door openings on the inside

of the box car. The function of those grain doors is to hold the grain in the car. My duty in connection with loading these cars is to take the spout out. We have a light signal [fol. 319] and when that is turned off we know that the grain is all down for that load. I would say that if the scale man is ready to go and you have the spouts in the car you can load about two thousand bushels of grain in about eight minutes.

After the grain is all down, you take the spout out and lay down your timber that holds it in there, climb down off your platform, take your blocks out from under the wheels, hook the cable on and pull the car on out, and move the next one up. It is always our custom up there to pull from the west to the east. Empty cars that are delivered to the Kansas Grain Company from the railroads are all placed on track No. 2 west of the elevator. The load is pulled in through the end of the shed in an easterly direction, and after they are loaded they are moved on out to the east. After they are moved out there to the east the next thing the employees of the Kansas Grain Company do is to go up in the car and trip the car; by that I mean they level it off. When you throw this grain back, it banks it back in the end of the car clear to the roof. You get a better sample if they level it off and after that he gets a sample in there. The grain samples are taken with what they call a probe. It is a tube affair, I believe six feet long, with another tube right inside that with a handle on it you can twist. There is little notches cut out on this tube all the way up to the top. You close the little holes in there, probe clear down to the bottom of the car and then open it and the grain runs in these little holes about four inches apart all the way down. That is the way you get your samples. They take about five samples in each car to get it even. [fol. 320] To get a decent one. These probes are taken to the office and there is a man that comes around and picks them up and takes them over to the Grain Exchange Building in Omaha. The purpose of the samples is to get the grade of the grain.

After the samples are taken, the elevator employees shut the door, put the pin in on the lock and put your seal on

there. When I referred to shutting the door, I was referring to the regular outside door of the box car. There is about six different grain company elevators in Council Bluffs, and I have worked for everyone of them except the Milwaukee elevator. I have worked for the Omaha elevator, Archer-Midland, Updike Grain which we refer to as the Northwest, Loveland. The work that I have performed with these other elevators is about the same as the work I did at Kansas Grain. When I went to work for Kansas Grain, there was an indication given me as to whether that work would be permanent if my work was satisfactory. In closing box car doors the standard equipment we always used around the elevator is a bar about an inch in diameter and three and one-half or four feet long, pointed on one and and just plain on the other. We usually try to pinch the door ahead if we have trouble closing them. Most of the box car doors you can close without using anything except your hands. If they close reasonably well, one man could do it, but if they were really tough there would have to be two men. This was necessary on many occasions. If the car is a wood car, one could pull on it and the other could pinch back there; one could pull on the door handle, and the other pinch ahead on the wood door. You usually just jab that point into the big sill and pinch it ahead, but on a steel car about the only way you can do is take a chain and put your chain on a hasp and take this little bar and have a chain with a ring on it and get behind the door stop and pull it ahead. The door stop would be at the closing end of the door where it prevents the door from going by the opening. This method was used quite frequently.

[fol. 321] In my experience in closing box car doors with the methods that I have described, I have never known a box car door to fall from the car. There was nothing different than the standard practice which I have described for closing box car doors that was followed in closing the box car door on Rock Island car 145287 on February 10, 1953.

(At this point, court was adjourned until 9:15 A.M. October 12, 1955 and reconvened pursuant to adjournment.)

Commencing at 9:30 o'clock a.m., October 12, the following proceedings were had in the absence of the jury:

The Court: I am prepared to take up the matters of the request for admissions made by plaintiff to the railroads. I understand it is agreed among counsel that the objections that might be made as though this were a deposition are available to counsel for defendants. Accordingly, we will utilize this period while we are waiting for an absent juror to see, whether by agreement, or as a result of my rulings, the requests for admissions will be read to the jury upon their return.

Mr. Beckman: Counsel for plaintiff takes the position that defendants may object at this time as to any pertinent objection of materiality, relevancy and so forth, but not as to hearsay or as to conclusions and so forth because the statements in and of themselves are, to a certain extent and must necessarily be, conclusions of fact.

The Court: Very well, we will proceed.

At this point, Mr. Beckman offered in evidence his requests for admissions directed to defendant Chicago, Rock Island & Pacific Railroad Company Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9. Request No. 10 was amended by counsel for plaintiff and as amended was offered without objection. Similar offers were made with respect to requests Nos. 11, 13, 14, [fol. 322] 15, 16, 17, 18, 19, and 20. Requests Nos. 21, 22, and 23 were amended by counsel for plaintiff to read as hereinafter set forth and no objection were made thereto. Request No. 24 was offered by plaintiff; defendant Rock Island objected to the offer on the ground that the facts therein stated were immaterial and irrelevant, and referred to facts occurring subsequent to the time when plaintiff was injured and the car was billed over the line of Union Pacific Railroad Company.

The other defendants made no objection to the offer. The objection was overruled by the court.

Mr. Beckman offered request No. 25 of his request for admissions to which defendant Rock Island objected as

immaterial and irrelevant for the reason that the paragraph states facts subsequent to the time when plaintiff was injured and the car was billed over the Union Pacific Railroad Company, and at a time when defendant Rock Island was acting solely as agent for the Union Pacific Railroad and the car was in the constructive and legal possession of Union Pacific Railroad Company.

Defendants Union Pacific and Chicago & Northwestern did not join in the objection.

The Court: In order that there may be no misunderstanding, I am going to show the whole history of the movement of this car and I will therefore overrule the objection. I want it for the benefit of the court as well.

Mr. Beckman then offered request for admission No. 26. To the offer, defendant Rock Island objected as wholly immaterial and irrelevant, refer to matters occurring long subsequent to the injuries of which plaintiff complains, referring to matters not germane to the issues, no issue in this case relative to worn brake heads. To allow the [fol. 323] jury to listen to such testimony would be highly prejudical to this defendant.

Defendants Chicago & Northwestern and Union Pacific do not join in the objection.

The Court: The objection is overruled.

Mr. Beckman then offered request for admission No. 27 to which defendant Rock Island objected to that portion reading "that Union Pacific Railroad Company completed repairs to said car Rock Island 145287 on February 24, 1953," as wholly immaterial and irrelevant to any issue in the case and referred to matters long subsequent to the injuries of plaintiff.

Defendants Union Pacific and Chicago & Northwestern do not join in the objections.

The Court: The objection is overruled.

The jury was called in to the court room at 10:30 o'clock a.m. and the following proceedings were had in the presence of the court and the jury.

Mr. Beckman: In order to acquaint the jury with the handling of this car prior to the time that Mr. Williams had anything to do with it, I shall read into evidence the request for admissions filed by the plaintiff.

The Court: Very well. I should explain to the members of the jury that under what we call the Federal Rules of Civil Procedure, the right is given to counsel for either side to address interrogatories, as we call them to the other side, to be answered, or to make what we call requests for admissions, and those are made in the form of requests for admissions of particular fact, and it is these to which counsel refers, and that he is now going to read to you so [fol. 324] that you will have the benefit of what is developed by that rule.

Request No. 1. That Flour Mills of America, Inc., now operates and at all times material to this cause, did operate a terminal grain elevator under the trade name and style of Kansas Grain Company at Thirtieth Street and First Avenue in the City of Council Bluffs, Iowa.

Request No. 2: That practically all of the grain moved to or from the aforesaid grain elevator was moved in railroad box cars.

Request No. 3: That all railroad box cars moved to or from said elevator are transported on a railroad industry track known as the "River Track".

Request No. 4: That said "River Track" at all points adjacent to said elevator is owned by the Chicago and Northwestern Railway.

Request No. 5: That said "River Track" extends from a point near Sixteenth Street in the City of Council Bluffs, Iowa, to a point near the easterly side of the Missouri River in said city, and lies to the south of said elevator. That said track runs generally east and west between said terminal points.

Request No. 6: That all railroad box cars placed upon the spur track of said elevator for loading or unloading grain are so placed by Chicago and Northwestern Railway Company.

Request No. 7: That officers and employees of said Kansas Grain Company periodically order empty railroad box cars for loading with grain at said elevator from the Chicago, Rock Island and Pacific Railroad Company.

Request No. 8: That pursuant to an agreement between the Chicago, Rock Island and Pacific Railroad Company and the Chicago and Northwestern Railway Company, empty box cars ordered from the Chicago, Rock Island and Pacific Railroad Company for use by said elevator are [fol. 325] placed on the railroad track commonly known as the "Seventeenth Street Connecting Track to the River Track" by the Chicago, Rock Island and Pacific Railroad Company and are moved to said elevator by the Chicago and Northwestern Railway.

Request No. 9: That on January 28 and January 29, 1953, employees of said elevator placed orders with the Chicago, Rock Island and Pacific Railroad Company for a total of thirty-five railroad box cars for grain loading.

Request No. 10: That on February 7, 1953, as a result of the orders placed on January 28 and January 29, 1953, Chicago, Rock Island and Pacific Railroad Company box car RI 145287 was inspected by one Bert Neumann, an employee of Chicago, Rock Island and Pacific Railroad Company, who carded said car as being "O.K. for grain loading".

Request No. 11: That no further inspection was made by any employee of the Chicago, Rock Island and Pacific Railroad Company of said railroad box car prior to the injuries claimed to have been sustained by the plaintiff herein.

Request No. 12: That on February 9, 1953 at approximately 5:00 o'clock a.m., a switch crew of the Chicago, Rock Island and Pacific Railroad Company in further pursuance of said order of January 28 and January 29, placed said Chicago, Rock Island and Pacific Railroad Company box car number R.I. 145287 on the aforementioned 17th Street connecting track to the River Track.

Request No. 13: That pursuant to the aforementioned agreement between the Chicago and Northwestern Railway Company and the Chicago, Rock Island and Pacific Railroad Company, a switch crew of the Chicago and Northwestern Railway Company, between the hours of 6:30 o'clock p.m. and 11:15 o'clock p.m. on February 9, 1953 [fol. 326] switched said box car to the spur track of said elevator and placed same in the usual position for empty cars west of the loading shed of said elevator.

Request No. 14: That during the afternoon of February 10, 1953 said car was moved in an easterly direction by employees of Kansas Grain Company into the loading shed of said elevator and was loaded with grain by employees of said elevator, including plaintiff herein.

Request No. 15: That after said box car was loaded with grain it was moved to a position east of said loading shed.

Request No. 16: That after being so placed a sample of grain was taken from the contents of said box car by one of the employees of said elevator.

Request No. 17: That upon completion of the loading of a box car with grain and taking a sample of grain therefrom, the usual custom and practice of the elevator employees was to close the doors of the grain cars and place seals thereon.

Request No. 18: That the plaintiff was injured while attempting to close the door on said Chicago, Rock Island and Pacific Railroad Company box car RI 145287.

Request No. 19: That the sample of grain taken from Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 was sent by messenger to the Omaha Grain Exchange on the afternoon of February 10, 1953, between the hours of 4:00 o'clock p.m. and 6:00 o'clock p.m.

Request No. 20: That on the morning of February 11, 1953, the Omaha Grain Exchange notified the Omaha office of Kansas Grain Company that the grade and type of grain loaded on Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 was No. 2 yellow corn.

[fol. 327] Request No. 21: On the morning of February 11, 1953, after receipt of notice of the grade and type of grain loaded on Chicago, Rock Island and Pacific Railroad Company box car RI 145287, from Omaha Grain Exchange, employees of the Omaha office of the Kansas Grain Company made seven copies of bill of lading No. 4544 in which Kansas Grain Company was designated as consignor and consignee, "notify Houlton Grain Company of Denver, Colorado," covering the contents of Chicago, Rock Island and Pacific Railroad Company box car RI 145287, and delivered same to the Western Weighing and Inspection Bureau offices in the Omaha Grain Exchange.

Request No. 22: Western Weighing and Inspection Bureau authorized transit of said car RI 145287 to Houlton Grain Company at Denver, Colorado, via Union Pacific Railroad Company, and delivered the original to R. C. Darcy who executed the same in the name of R. A. Foral, General Agent of the Freight Department of Union Pacific Railroad Company, at or about 10:45 o'clock a.m. on February 11, 1953, and returned four copies of said bill of lading to the Omaha office of said Kansas Grain Company. On February 11, 1953 at 11:00 a.m. employees of said Kansas Grain Company released car RI 145287 by delivering a release sheet to the joint checker employed by Chicago and Northwestern Railway Company designating said car to be routed via "R.I.-U.P.", which initials refer to Chicago, Rock Island and Pacific Railroad Company and Union Pacific Railway Company.

Request No. 23: That all defendants in this action were, at all times material to this cause, parties to the Association of American Railroads Code of Rules governing the condition of and repairs to freight cars and for the interchange of traffic between railroads and that all of said [fol. 328] defendants had executed the so-called Freight Car Interchange Rules Agreement in conformity to said Code of Rules.

At this point, Mr. Webster requested that the record show the objections of Chicago, Rock Island and Pacific Railroad Company without repetition.

The court then made the following statement:

"It will be unnecessary for you to repeat any objections that you made to any of these admissions when we were going over them in the absence of the jury, and they will be deemed a part of the record here so far as you are concerned, and of course, an exception is granted."

Mr. Beckman then continued reading the requests for admissions as follows:

Request No. 24: That after the release of Chicago, Rock Island and Pacific Railroad Company box car number RI 145287, as hereinabove stated, a switch crew of the Chicago and Northwestern Railway Company removed said car from the spur track of the Kansas Grain Elevator to a point at which cars were customarily received by the Chicago, Rock Island and Pacific Railroad Company, and said box car was removed by a switch crew of the Chicago, Rock Island and Pacific Railroad Company to a track known as the repair track in the yards of the Chicago, Rock Island and Pacific Railroad Company in the City of Council Bluffs, Iowa.

Request No. 25: That said Chicago, Rock Island and Pacific Railroad Company box car RI 145287 remained in the physical possession of Chicago, Rock Island and Pacific Railroad Company until February 23, 1953, at which time said box car was switched by a switch crew of the Chicago, Rock Island and Pacific Railroad Company to the Union Pacific Railroad Company in Council Bluffs, Iowa.

[fol. 329] Request No. 26: That on February 24, 1953, said Chicago, Rock Island and Pacific Railroad Company box car #RI 145287 was inspected by the said Union Pacific Railroad Company and was declared "Bad Ordered" at that time for worn brake heads and because a door was out of a top door track.

Request No. 27: That the Union Pacific Railroad Company completed repairs to said box car #RI 145287 on February 24, 1953 and thereafter transported said car to Denver, Colorado over its own line of railroad.

[fol. 330] It was stipulated and agreed between counsel for plaintiff and counsel for all defendants that if DR. HERMAN F. JOHNSON of Omaha, Nebraska, were present in court today he would testify that he is a member of the partnership of Schrock, Johnson, Waters & Hood, Orthopedic Surgeons, of Omaha, Nebraska, and a specialist in the treatment of injuries and diseases of the bones, and further would testifiy as follows:

"At the time of our first examination, July 15, 1954, Mr. Williams complained of early fatigue with occasional severe low back pain, also some pain in the lower right leg. He was again examined on May 25, 1955, and his com-
[fol. 331] plaints and findings were the same as in 1954.

Examination: July 15, 1954. Mr. Williams is 59 years of age and weights 180 pounds. He walks with a slight limp. Spine: The spine is straight. Forward flexion brings the fingertips four inches from the floor. Extension is thirty degrees, while lateral tilts are twenty degrees. There is no muscle spasm or tenderness.

Lower [extremeties]: The reflexes are present, although the right tendon achiles reaction is sluggish. Straight leg raising is limited to thirty-five degrees on the right and forty-five degrees on the left. The strength of the extremities is good and equal. The limbs are the same length, although there is some atrophy of the right thigh so that six inches above the patella the circumference is nineteen and three-eights inches, while the left is nineteen and three-fourths inches. The upper right calf is thirteen and five-eighths inches, while the left is fourteen inches.

Righ leg: There is a well-healed linear operative scar four and three-fourths inches in length over the crest of the lower tibia. There is some irregularity and tenderness over the medial surface of the bone about four inches above the ankle. This apparently is the head of a fixation screw. The tibia is firmly united and straight. Motions of the right ankle are complete.

X-ray Examination: The dorsal and lumbar spine shows a persistent compression of the 10th and 11th thoracic vertebrae. The 10th being depressed about one-fourth of an

inch. There is bridging between the two vertebral bodies, and the intervertebral disc space is narrowed. The lumbosacro region shows extensive spur formation on the [fol. 332] lateral margins of the fourth and fifth lumbar vertebrae. In the lateral view there is evidence of slight compression of the fourth lumbar vertebral body on the anterior-superior margin. The lumbo-sacral angle is somewhat increased. The right tibia is firmly united and straight. The fixation screws are securely in place.

Comment: In my opinion, Mr. Williams had reached his maximum improvement when last examined on May 25, 1955, and has a twenty percent permanent impairment of the body as a whole as a result of the injuries described. This disability is great enough to make it difficult for him to do heavy work such as scooping grain, moving grain spouts into grain cars, closing box car doors, and so forth. He is now sixty years of age, which is also a factor. In other words, Mr. Williams is a light duty man."

W. E. Williams, plaintiff, was next recalled for further direct examination as follows:

On February 10, 1953 I went to work at 8:00 o'clock a. m. There were then some six or seven empty cars on the loading track at the elevator at a point west of the loading shed. The checker for Kansas Grain Company goes out the first thing in the morning and gets the numbers and initials of the cars to see how many he has to load there. Outside of that, in the ordinary custom and practice of handling these cars no employee of Kansas Grain Company elevator would have anything to do with these cars prior to their loading. There were six cars loaded with grain at the Kansas Grain elevator on February 10, 1953. Three cars in the morning and three in the afternoon. Car RI 145287 was loaded in [fol. 333] the afternoon, the second car during the afternoon. That car was moved into position for loading around 2:30 or a quarter to three. As I explained before, the car was moved into position with the car puller. The loading was done and we pulled the car on east of the loading shed a distance of about two car lengths and was left sitting

there. In everything that I had to do with the loading and moving of that car, I had nothing to do with the door and track mechanism on the north side of Rock Island box car 145287 at that time. After that car was loaded, I took the car puller cable back and hooked it on to the next car and it was moved into position.

About 4:10 p. m., I was up on the loading platform, had the spout in the car for loading the third car and gave the light to drop the grain, and I see Mr. Sigler has got his sample out of the car and was working on this door to close it. He seemed to have trouble getting the door closed and I asked him what was the matter with it. He said he was having trouble. I told him I would soon have this other car loaded, and he could get this sample out of that and close these doors on this car that I was loading, and I would go out and see if I could close this Rock Island car. Mr. Sigler had that bar and chain with him at the side of the car when I saw him there.

[fol. 334] After that I finished loading this car that I had spotted there, took my spout out and took my block out from under the car wheels and then I come on out there in the yard and Mr. Sigler went on to work on this other car to get his sample and close the doors on it. Mr. Rounds came out of the main part of the elevator as I started to walk down towards this Rock Island car. I told him I thought I needed some help in closing this car door and he goes down there with me. Exhibit "D" is a picture of a box car door and that is the type of box car door that was on the side of this Rock Island box car. When I came up to the car the door was about a third closed. There is a handle on the box car door toward the bottom at the left hand side as you face the door. There is some rollers connected in there. When you pull down on this handle it elevates the door slightly so that it will roll on these rollers. Unless that handle is pulled down the roller mechanism is not in gear you would say. The figure "1" in red pencil shows the handle at the lower lefthand corner of the door that I referred to. Mr. Rounds took hold of that handle and pulled it down, raised it up on to the rollers and pulled

with his right hand on the car door. The figure "2" shows the bracket that Mr. Rounds pulled on. I have placed the figure "2" on Exhibit "D" with pen.

I took this little bar that is about three and one half feet long—a steel bar with a point on one end—and I got to the back side, or west side of the door and I was trying to pinch it ahead while he held the roller. By pinching ahead I mean pry it ahead. This was a steel car. The only way you could pry it ahead was to get the point of the bar behind a rivet on the side of the car. Mr. Rounds and I closed the door a short ways by that method. Then I got that chain that we had and hooked it on the hasp on the car, what I would call it. I have marked the location of the hasp on the door on plaintiff's Exhibit "D" with the figure "3". It is about a third of the way up and close to the outer edge of the door. The chain had about a three-inch ring on the end of it and there is a steel beam that runs up and down the car, or door stop we call it. The steel beam I have marked with the figure "1" on Exhibit "C" and that is the portion that I refer to as the door stop. We had the chain hooked on this hasp and we took the bar at about a 45 [fol. 335] degree angle and stuck the point behind this upright or door stop and just worked it ahead. The bar was about one-inch in diameter. You just pull it forward, then get another bite you know, and just work it ahead.

By using that method of closing the door Mr. Rounds and I moved it some and I would say that we got it to within about eighteen inches of being closed. The method that I have described was no different than the methods customarily followed at all grain elevators where I have worked. I did not do anything any differently than I have ever done in closing other car doors. Mr. Rounds and I discussed about what would do next, and I told him I thought we should take the chain off and I would go to the back of the car again. It begin to move a little bit easier. While I was working with the chain Mr. Rounds was there holding this handle down so it would roll on the rollers. I told Mr. Rounds I thought we would have better luck moving it if I took the chain off and he would hold this handle down and I would go to the back of the car like I did when we first started with the bar.

I took the chain off the door and laid the bar down on the ground about the middle of the car. Mr. Rounds said, "Well, I thought we could get it that way." He stepped aside and I stooped over to get this bar. Mr. Rounds released the handle and as I stooped over to get this bar he shouted, "Look out" I didn't think such a thing as the door would fall, and when I first looked, I thought maybe they were moving the cars or something. I looked up and it was the door about two feet off the track at the top. The door was falling out from the top. I tried to get out of there as fast as I could and I ran in a kind of northwesterly direction. The car door hit me over the head, knocked me down and I don't know whether I blacked out for a little while or not.

[fol. 336] The next I remember I was lying by the tracks there on my back and I couldn't breathe. I thought I was dying. I couldn't get my breath on account of my back was injured and my stomach felt like it was crushed. My teeth were knocked out in front. About two clear out and about four loosened. There was blood all over my mouth and face and my head and back was paining. I was flailing my arms around in such pain. I tried to get up and I couldn't move my right leg. The elevator superintendent, Mr. Stump, was there, and I said what is the matter with that leg of mine and he said "Well, it is broke." The ground [fol. 337] was frozen there at that time. We had a snow some time before that but the snow was mostly gone. There was a little hanging around in the shady parts of the building or cars and it was a pretty crisp day. An ambulance came probably in about fifteen minutes, although it seemed longer and they loaded me in the ambulance on a stretcher. I was still in pain in my back and stomach, couldn't get my breath and my leg was beginning to ache. I was taken to the Jennie Edmundson Hospital and I remember the pain as the ambulance went over some pretty rough streets.

I was put in a bed in the hospital, but I do not remember being x-rayed there. I don't remember getting any shots of any kind immediately after arriving at the hospital. I remember that Dr. George Pester came in and talked to me and they cut my clothes off at that time and put a gown

on me, and Dr. Pester adjusted my leg and put some kind of a roll under my back. It seemed to me like the roll was a log about eight inches in diameter with a cloth wrapped around it. I remained in the hospital in that position about seven days, and I suffered terrible pain all that time. The back pain was so bad I could hardly feel the leg. They gave me hypos in the upper part of the arm. I received many of them and my arms would get sore and they would alternate between the right and left arms. After a week in the hospital they took me to surgery and gave me an anesthetic that blacked me out. The next I remember I was back in bed again. I had a cast extending from my neck clear down to the lower part of my stomach covering the whole torso of my body. I also had a cast from my hip down to the bottom of my foot on my right leg. I had terrible pain in that right leg then. The hypos relieved the pain quite a lot but I had some pain all along.

I remained in the hospital seventy-two days. At first this cast was so tight that it was awful uncomfortable. I couldn't even move at all hardly, only under my arms. The cast was green and wet and the first week it was something awful. It fit so tight that it sort of took my breath away. I would say that I was kept in bed without getting up approximately three weeks after I had my surgery. I had some complications while I was there in the hospital. I had awful pains in the back of my head. Later they went down into my ear and then seemed to work down to my left lung. I was spitting some blood and I told Dr. Limbert my lung [fol. 338] was sore and Dr. Jorensen came in and checked me over and they gave me shots in the large vein in my arm. The shots were given me every four hours. They had to alternate from one arm to the other because my arms got sore. There was an awful soreness on my left lung and I could hardly [breath] and it seemed to get more sore about a week after I first felt the soreness in my lung. One night about 11:00 o'clock I got sick to my stomach, my breath just seemed to shut clear off and I blacked clear out. It lasted about ten minutes and then I felt somewhat better. That soreness continued for about ten days I think. While this treatment was going on the doctors told me to lay perfectly still, have the nurses feed me, and not to move. After

this condition passed they tried to get me up in a chair, but with this cast it seemed like, when I sat back in a chair, it would cut my breathing off and so I couldn't sit in it. Afterwards they brought in crutches and I would kind of balance myself on the crutches with a nurse on each side: I would walk a little down the hall for about ten or fifteen minutes every day. With this big cast on my right leg I couldn't turn to my right, and if I moved the nurses would have to move me. All during the period that I was in the hospital there were times I would have terrible pains, both in my leg and in my back.

Just shortly before I left the hospital they took me down to the x-ray department and took the leg cast off. After x-raying the leg they replaced the leg cast but the body cast stayed on. After the cast dried out it kind of shrunk and I got an awful itching on my back. The nurses were not able to wash me underneath the cast. The sensation I felt was like you would like to get around and [scrap] it, just tormenting you all the time. After they put the second cast on my right leg they returned me to my hospital room and I think I remained in the hospital a couple or three days after that and I was taken home in a private ambulance. I was then placed on a kind of low bed in my living room, and was carried into the house on a stretcher and placed in bed. I stayed there somewhere between thirty and forty days. I still had the body cast, and a pretty long cast on the leg, and I wasn't able to get up on my feet and move around with crutches. I wasn't able to sit up in a chair. I could sit on the side of the bed if they held me up and raised me up off the bed. After sitting up for a f w minutes [fol. 339] I would have to go back to bed.

My wife and daughter attended me after I was taken home. My daughter is a registered nurse and she took care of me in the evenings and my wife and daughter attended to my every need for about thirty days. After about thirty days I was taken back to the hospital in an ambulance, carried out of the house and into the hospital on a stretcher. They took my body cast off at that time by sawing it on each side. The hide was all peeling off my back and it was really a relief to get the cast off. They took the leg cast off too and put a short cast back on.

X-rays were taken of my back and leg at that time. The short cast reached below my knee down over my foot with kind of a rubber heel effect on the bottom of it. After that cast was put on I was permitted to walk. At first I could just walk on level places. I couldn't go up and down steps or anything, but with crutches I could get around a little bit. I believe I was at the hospital just overnight. Came in one day and out the next, and was taken home in an ambulance. With help I was able to walk into the house with crutches.

I attempted to develop my walking powers. I discarded the crutches in about thirty days after this second hospital trip and used a cane. I called on Dr. Limbert at his office after my release from the hospital. It seems to me that the short cast remained on my right leg about a month. It was taken off at the hospital by Dr. Pester. I was then walking with a cane and continued that for about thirty days. I limped and it bothered me some. It seemed to be getting along pretty well there, but then it started to get awful sore right in around the instep of my foot. My back got awful tired. I couldn't sit up for long at a time, it got so tired I had to lie down. I believe it was some time in May if I remember right, that this trouble developed. I was given shots for lack of calcium in the bones at Dr. Limbert's office. There were around twenty of those in-
[fol. 340] jections given me in my hip with a hypodermic syringe. Some of the soreness went out after I had been taking those shots. I think those shots were finally discontinued in May of 1954. Around June 30 or July 1, 1954 the doctor told me it might be all right to attempt to return to work.

At this point the further hearing of this case was adjourned until 1:45 P.M. October 12, and [the] reconvened pursuant to adjournment at which time directed examination was continued as follows:

I would say that a steel car door would weigh about 800 pounds. I returned to work at the Kansas Grain Company around the 19th or 20th of July, 1954. When I returned to work I operated a power shovel as I have described earlier in my testimony. I think we had thirteen

cars for unloading that day. I helped unload about four of them. I worked all that first day. My back got all tired, my leg got pretty lame along in the afternoon. That evening I had quite a lot of pain in my back and leg and I didn't sleep much that night. I returned to work the next day and was out working on a shed setting some posts to brace the shed up there. The posts were about eight feet long and about eight inches in diameter and we set them in the ground at an angle against the shed. We had to dig holes to put them in and tramp the dirt in around them. I couldn't stand on one foot and press the spade in the ground and balance myself too well. I didn't do any of the lifting in placing these posts in the holes. I experienced a lot of pain in my back and legs.

I worked the second day for eight hours. My back wasn't quite so lame that evening or my leg, and I did sleep a little that night. I returned to work the third day and if I remember right we went out and worked on the same job setting these posts until about noon. In the afternoon of the third day we unloaded three or four cars there. I experienced pretty severe pain in the afternoon of the third day in my back and leg. I was pretty tired when I got [fol. 341] through work, my back ached and my leg ached. On the fourth day we were back on this job of the posts again all day long. There was some discussion there about my work. I was not discharged from the work. I worked all that day and I just told Mr. Stump, the superintendent, that I couldn't continue to work on account of the pain in my back and leg.

After I left that job I first went to the State Employment office and registered for work there like they usually do, and they told me that they would call me if anything turned up. In registering I was required to state the reasons I left or was discharged from previous employment, and I had to list the disability that I had at the time I made that application. That same day I went over to the American Smelter Refinery at 9th and Douglas in Omaha, Nebraska, and applied for a job, but they were shut down, but I was told that you would have to pass a physical examination and they were not hiring any men at that time. I came back home. The employment office called me and told me that

they thought they had a job I could handle and they gave me a card to go down to the Flynn Construction Company. This was three or four days after I had worked at the Kansas Grain Company. I still had pain some in my back and leg from the work I had done at the Kansas Grain elevator. At the Flynn Construction Company they told me that they needed a flagman and they had a job up in Little Sioux, Iowa, about fifty-five miles away. I was told to report down I believe on 10th Avenue in Council Bluffs at 6 o'clock in the morning. I went down there at 6 o'clock the next morning and got in a truck and it took me out to Little Sioux. There was very little pain in my leg at that time. My back was tired, but not too severe pain. When we got out to Little Sioux it was raining and they said we couldn't work, but said stay there for a while and they said we would go to work at noon if conditions were right. It kept on raining and they brought us back to Council Bluffs. We didn't work any and I didn't get any pay for that day. The next day I reported down there at 6 o'clock and they waited awhile to see what weather condition was [fol. 342] and finally decided they wouldn't attempt to go out on the job. The next morning I reported at 6 o'clock again, stayed around there until 8 o'clock when the man at the office said they went out at 5 o'clock, that they were supposed to have got a watchman and he would find out and call me that evening but he didn't.

Mr. Webster: Now if the court please, the defendant Rock Island moves to strike the testimony of this witness relative to the Flynn Paving Company job as being wholly immaterial to any issue in this case under the testimony as given by the witness.

The Court: The only reason that I consider that it is material is as an indication of the good faith of this plaintiff in trying to find employment, and I think the fact that he tried to find employment with Flynn Paving is a matter that the jury is entitled to take into account.

The next thing I did in attempting to find employment I went over to Omaha at several places. I answered an ad at an auto parts place on Cummings Street and applied for

a job but I did not get any work. They said what they wanted was a young man to learn the business. I went to the Huss Motor Company at 123 West Broadway in Council Bluffs. They had an ad in the paper for a parts man, or a parts man helper and I applied for that, but did not get it because they wanted a younger man to learn the business. I also saw an ad in the paper at the Walnut Hill Cemetery in the 1200 block on East Pierce Street. After quite a lot of trouble I got work there. I watered shrubs and flowers and did odd jobs around there. I continued to work at that job as long as it was available. About five weeks. I only got about $15 in wages for that five week period. They asked me if I had even done any painting and I told them that I couldn't paint on a ladder but I could paint from the ground. They offered me a job as a painter, but it rained so much I couldn't do that. That was during October, 1954. [fol. 343] They were to call me if weather conditions were right for the paint work, but they didn't call me.

I looked for work after that; whenever I saw an ad in the paper I would go and look for it. I answered every ad for work I thought I could qualify for. The only work I have done has been odd jobs around that I could get. Along about April or May, 1955, I attempted to work for that company.

Q. Tell the court and jury your experiences on the day you went to work for the Holland Furnace Company?

A. Well he told me he was going to put me on one of those big---

Mr. Webster: If the court please, we object to what the employer stated to Mr. Williams.

The Court: You can say what you did, Mr. Williams.

The Witness: Well, I was to clean furnaces.

I went to work that day and stayed there at the Holland Furnace place until about noon. They said we had two furnaces to clean down at Glenwood, Iowa, and I went down to Glenwood to the address that they gave me and told the lady at the house that we were there to clean the furnace

but we were refused any opportunity to clean that furnace. The man I went with was an older employee. We cleaned the one furnace, but we had to wait until around 5 o'clock in the afternoon for the man's wife to come back until we were given permission then to clean the furnace.

Q. Were you given permission then to clean the furnace?

Mr. Webster: If the court please, I have difficulty seeing the materiality of this testimony and this detail.

The Court: Well, he is showing what work this man has done, I assume, as bearing on his ability to work, and the type of job that is available to him, and I think he may continue to show it.

[fol. 344] We finished this work around 5:30 in the evening and returned to the office here in Council Bluffs. We were supposed to be paid on a piece work basis for that work and my compensation for that day's work was $2.50. My back hurt me pretty bad that night. We had to unload these bid round rubber hoses, and pull them off the truck, connect them up and run them through the basement window to clean the furnace and in stretching and dragging them around my back hurt me pretty bad that night. There hasn't been any other job of regular employment that I have been able to obtain since April, 1955.

Q. Did you exert every effort possible to you to find other employment at all times since your accident?

Mr. Webster: Objected to as a self-serving declaration.

The Court: I think he is the only person who can answer the question. A. I did.

I put some storm windows in for a Mrs. Ruth Fleg. I put in new glass and the frames needed repairs and got $5.00 for that work. I also helped paint some rooms in the house for one day, for the same lady and I got $10 for that. I have mowed some lawns with a power mower that belonged to my son. I got those jobs by just inquiring around for mowing the lawns. I did that in the summer

of 1955. I earned about $25 doing that kind of work. I also used my car and hauled some berries in for a friend of mine from his place out in the country. I think I earned about $25 or $30 doing that work. I made $54 at the elevator job for four days and I think since I was discharged by Dr. Limbert on June 30, 1954 I have earned about $175 at other jobs. I still have a tired feeling and my back gets pretty tired by night. I have a pain in my leg if I do a lot of walking around. If I do any heavy work I have severe pains there in my back.

[fol. 345] Cross-Examination.

By Mr. Webster:

I worked for the Scoular-Bishop Grain Company before working for the Kansas Grain elevator. I farmed in Pottawattamie County in Hazel Dell Township, on a farm which I owned. It was eighty acres. That was just after the last war. Before farming in Hazell Dell Township, I worked at the Glen L. Martin Aircraft Plant for about three years at Fort Crook, Nebraska. Before I worked at the Martin Aircraft plant, I worked for the Archer-Daniel Midland Grain Company. Years ago, I worked for the Union Pacific. I started there as an apprentice to learn car repairing in the Union Pacific shops in Omaha. I went in there as an apprentice, and I was graduated to a regular car repair man. I would say I was employed in Union Pacific shops in Omaha about four or five months. They were short of men at that time and I was promoted pretty fast.

There were about four men at the Kansas Grain Company elevator doing the same type of work I was. One was Mr. Sigler, one was Mr. Rounds. I would judge Mr. Rounds is about 55 years old, Sigler is about 35.

The car puller shed is north and east of the loading spout. The loading track runs east and west at the elevator. The cars are pulled generally from west to east. Defendant Rock Island Exhibit "13" appears to be a plat of the ground around the Kansas Grain Company elevator.

The farthest south track shown on that Exhibit would be the River Track. The first track to the north of the River Track is called the "hold track" and the next track is the "loading track". The inside track, or the northern most track next to the elevator is the "unloading track". The cars that I have referred to were all on the loading track. The car pulier is located about where I have made a square [fol. 346] located with an x on the plat Rock Island Exhibit "13". The car puller located in the shed has a steel cable which goes out over the shive wheel there and the cable threads through the shive wheel so that it will pull straight through to the drum and then back here (indicat- [fol. 347] ing). The shive wheel is located between No. 2 and No. 3 tracks.

Rock Island car 145287 before it was pulled up into position for loading, was located about where the little square is shown on the loading track. After that car was loaded it was pulled on out to the east and I think the mark which I have indicated on defendant Rock Island Exhibit "D-13" would be the approximate location. After car RI 145287 was pulled out to the east I then commenced to load the sixth car. When I went over to close the door on that car, it would be around 4:10 or 4:15. After I finished loading the sixth car, I went over and called Mr. Rounds and asked him to come and help me. The door was about two-thirds open then. By using the bar on the rear of the door and with Mr. Rounds holding on the lever and pulling we closed it part of the distance. Then we took the chain and bar and began to attempt to close it that way. The point of the bar was put just in front of the upright, which I call the door stop. It would be the door post. The ink mark on the left side of the door opening on Exhibit "C" shows about where the point of the bar would be placed.

I would say I had been working on the car door ten or fifteen minutes before the door fell. After I made this first attempt to close the door from the rear by pinching on it and pulling on it, I looked the door over to see why it wasn't closing. I looked underneath the sill, I also looked at the door post and at the top. We had the sill cleaned

off so there was nothing under the door to hold it. There was a little snow along the side of the track that had melted there that day. Just icy kind of. When I looked underneath the sill I couldn't see anything that looked unusual to me. It was just binding at the bottom and the door was tight at the bottom. I looked up at the top of the car also and the car seemed to be all right at the top. I looked at the sills and at the door posts. Everything looked all right to me.

I would say the door I was working on is something on the same type as the car door shown in defendant Rock Is- [fol. 348] land Exhibit "2". It had a handle on the door something similar to that that worked the rollers that I have referred to. The lever or handle is about in the same position there on the left hand corner of the door as shown in Rock Island Exhibit "2". It also has another handle to pull on in the righthand corner. I think that the handle sets horizontal to the ground rather than vertical, and I believe this door catch here was a little different than the one shown in the photograph. Defendant Rock Island Exhibit "1" looks more like the kind of door I was working on that afternoon, but I think the little handle was the other way rather than up and down.

I would say that the defendant Rock Island Exhibit "4" looks like the Rock Island box car 145287 that I was working on that afternoon. In general, I would say that was a fairly accurate portrayal of the car. That shows a grain door in the car in that picture. That is what we call a new type grain door, not the type I testified about yesterday. Defendant Rock Island Exhibit "11" appears to be a photograph of the same type of door that I was working on that afternoon. Defendant Rock Island Exhibit "12" I wouldn't say appears to be a picture of box car RI 145287 that I was working on that day. There is no door shown on this car in the photograph. Aside from that I would say that the car was something similar to that. The car puller shed is shown in the photograph defendant Rock Island Exhibit "12" by the small building with snow on the roof and with the door open in the picture.

I put the hook on to move this Rock Island car with the car puller myself, but of course, we have to have a man operate the car puller. The car puller is a power winch and the cable wraps around this steel drum and it takes up the slack on the cable and pulls the car. The point where I attached the hook of the car puller to pull the car is indi-
[fol. 349] cated by an arrow pointing to a beam of the car in defendant Rock Island Exhibit "4". The cable would be off to the right and if you were pulling to the
[fol. 350] right you would hook it back here, but if you are pulling to the left you would pull on it the other way. The cable pulls slightly out from the car as well as straight down the track because the shive sets out about two feet away from the track. I think when I took the car from its original position and pulled it into the loading shed it moved about three car lengths. A car length would be about forty feet. I think the car was probably setting about eighty or one hundred feet west of the loading shed, when I first hooked the car puller onto it to pull it in to the car shed to load the car. When we pulled it out of the shed after it was loaded it was pulled about two car lengths, or about eighty feet east of the east end of the car shed. We have just the one car puller there. There is quite a down grade here toward the east. You don't have to pull them all the way. You pull them and they start and they will roll. There was four cars in on that same track east of the loading shed when this car was moved to the east of the loading shed. If a car runs too far to the east we just block it. Usually it just rolls down there easy and it will stop when it connects with the other cars. We open the coupler and let them move in on the standing cars and it will couple. We couldn't pull a car east of the car puller shed.

I would say that the vertical bar on the left side of the box car shown in Exhibit "10" is similar to the door stop that I have been talking about and it was to the left of the door stop that I put the point of my bar while attempting to close the door with the bar and chain. The point where the bar was placed would be about opposite the hasp so as to pull it as even as we could. I have made a mark on defendant Rock Island Exhibit "10" underneath

the place where the hasp meets the door post and that is about where the bar was placed. The door was being pulled from west to east in trying to close it. You put about as much of your full weight against the bar as you could handle. You just face the car, put your bar through this ring in behind the door stop at about a 45 degree angle and pry from right to left. We did that several [fol. 351] times on this particular door because we could only get about three or four inches movement at a time. When we started the car door was about two-thirds open, we moved it about a foot or so with the bar behind the door, and then closed it from that distance up to the point where it was about eighteen inches open with the chain and bar method. While I was using the bar Mr. Rounds was pulling with one hand and holding the lever down so as to raise the car door on the rollers with the other hand.

At this point defendant Rock Island Exhibit "12", it was agreed, is a photograph of Rock Island box car 145287 taken on February 11, 1953 at the Kansas Grain Company elevator by Maxmillian Studios. Exhibit "12" offered in evidence and received without objections.

The same stipulation was made with reference to defendant Rock Island Exhibits "5" and "7" and were received in evidence.

In Moving railroad cars I have never attached the hook from the car puller winch to the stirrup of a railroad car. I have never seen that done out there. I did not examine the stirrup steps on this Rock Island car 145287 on February 10, 1953. I don't recall looking at them in any way. I understand what you are referring to by the stirrup steps. They are the steps extending below the front of the car where you begin to climb up the ladder on the side or end of the car. I have never used the power winch car puller to close a door on a box car there at the Kansas Grain Company elevator. I have never seen that done. I do not think I have ever used any mechanical means, aside from man power, at the Kansas Company grain elevator. They customarily bring these cars in there during the night or early morning hours. There is a railroad checker out there at the Kansas Grain elevator. I have never called on

the railroad to close a door that we were unable to close. It has never been done there at Kansas Grain Company that I know of. I have never had occasion to complain to the railroad employees about my inability to close a door on a [fol. 352] box car and have never said anything to the checker about it. Tom Foster was my immediate boss at the Kansas Grain Company. He was the foreman for grain loading. I have had occasion to complain to Mr. Foster about being unable to close car doors. I don't know whether Mr. Foster has ever asked any railroad employee to help close the doors. It was daylight at the time that I was working on this car door.

Since June 30, 1954 I have had occasion to do work around my home at 1504 Third Avenue. That is a residence and we rent one apartment upstairs. It is an eight room house. The whole upstairs is one apartment which we rent out. In addition to that residence property I own an apartment house here in Council Bluffs.

Q. How large a building is that Mr. Williams?

Mr. Beckman: I object to that as being irrelevant and immaterial and it is not cross-examination, your honor, and having no bearing on any issue in the case.

The Court: For the purpose of showing any work that he may do, and physical labor about the place, he may testify, but so far as using it for any other purpose, no.

I have been doing some work around that apartment building. I polished the floors and painted walls as high as I could reach. I have not changed storm windows or anything of that kind. I have a man in the rear apartment there that helps out.

Witness Called for Further Direct Examination.

There was two thousand bushels of No. 2 yellow corn loaded in Rock Island box car 145287 on February 10, [fol. 353] 1953. A bushel of corn weighs approximately 56 pounds so that would be a total weight of 112,000 pounds of grain in this car. In closing a car door, you would not place your bar on the inside of the lefthand door post which

is shown in defendant Rock Island Exhibit "7". The stirrup of the Rock Island box car 145287 is shown by defendant Rock Island Exhibit "5". There is an iron step extending under the left front corner and beneath the grab irons at the corner of the car.

Cross-Examination.

By Mr. Webster:

Q. Mr. Williams, it was stipulated that there was certain medical expenses and hospital bills incurred because of your injury. Can you tell us whether or not you have paid those bills?

Mr. Peterson: Objected to as immaterial and irrelevant.

The Court: It is, whether they are paid or not.

Hiram Rounds, called and sworn on behalf of plaintiff, testified as follows:

Direct Examination.

By Mr. Beckman:

I am 56 years of age and am employed by Kansas Grain Company. On February 10, 1953, I was working at the Kansas Grain elevator as a laborer or shoveler. I recall the injury to Mr. Williams. We had been running a cleaner in the elevator cleaning corn for what we was going to load. I started out the door and Mr. Williams said, "I got to have some help". I said "I will get the chain" and he said "You don't need to, the chain is already out there". That was at 4:20 or right close to it. I have had experience in closing box car doors at two other elevators as well as at the Kansas Grain elevator.

[fol. 354] In closing box car doors at other elevators, we used the same procedure on doors that were tough to close. You use a bar about three or three and one-half feet long. A straight bar, pointed on one end and approximately one-inch in diameter. The procedure that was followed that afternoon in attempting to close the box car door on Rock

Island car 145287 was the same as followed at the other elevators and the only one I ever did. I never had had the experience of a door on a box car falling off while doing that. The chain was hooked on the hasp of the car door, Williams put a bar through the end ring on the chain. I was pulling down on this lever and reaching out with my other hand on the door pull. Before that we tried to pry the door forward from the rear, but it wouldn't move much. By using this chain and bar I would say that Mr. Williams and I got the car door within one to one and one-half-foot of being closed. Mr. Williams then took the chain off the door and he said "We'll have to figure on some other way of closing this". I did not see Mr. Williams stoop to pick up the bar. I released the handle or lever that I had been holding at that time. That handle when pulled down releases the weight of the door on the track and puts [in] onto the rollers. Pulling down on the handle lifts up on the door. When you release the handle, the door would settle back onto the lower door track.

When I released that handle or lever on the afternoon of February 10, when the door was about one foot or a foot and one-half from being closed, I don't say it happened right at that second when I released the handle—but right close, there was a kind of a popping noise. I looked up [fol. 355] and seen this door coming out from the top, at an angle. I hollered "Look out" and run. I was right [agin] the car going west, and the further I got out the more I had to bend over to keep the door from catching me. When the door came off, neither Mr. Williams nor I were applying any effort whatever in trying to get the door closed. The door really scraped my back and I was bent over to keep it from catching me. It seemed to jump out from the lower door track and left the car completely. I didn't see Mr. Williams so I knew he must be under the door.

Mr. Herring and Mr. Sigler came over and between us we raised this door up and slid it east on the rails off Mr. Williams' body. There were rails to the north of the track on which this car stood. I would say that car door would weigh between eight and nine hundred pounds and the three of us that I have named picked up the edge of the door and

slid it up the track. After we got the door off Mr. Williams he was lying between the rails with his right leg over the rail, with his torso between the rails. He was bleeding all about the mouth and complained of his leg and back. He said "Boys it's just killing me". Mr. Stump told someone to call the emergency unit and I would say it was not over ten minutes before it arrived there. After the ambulance got there, Mr. Williams was taken away in it. He seemed to be suffering a good deal of pain while he was on the ground there.

Cross-Examination.

By Mr. Webster:

The place where Mr. Williams put the bar point when he had it through the chain ring to pull on the door and close it was right at the east side of the door post. We were there [fol. 356] working on the door quite a little while, but I don't know just how long. When we started working on the door I would say that it was close to one-third closed. Aside from the little that the door may have been moved by prying on the west end, we closed it up to a point of between 12 and 18 inches of being closed by the method I have described. We had been able only to move the door approximately two inches with each pull.

Redirect Examination.

By Mr. Beckman:

I have closed lots of doors like this on many occasions.

Further Cross-Examination.

By Mr. Webster:

I see a railroad checker around the Kansas Grain elevator once in a while checking—not every day. My work is usually inside but there is a railroad checker that comes around there. I have never had occasion to ask any railroad men for help in closing doors; that would not be my job anyway. That would be up to the superintendent.

DUDLEY C. SIGLER, called and sworn on behalf of plaintiff testified as follows:

Direct Examination.

By Mr. Beckman:

I am 37 year old and was employed on February 10, 1953 and at the present time, by Kansas Grain Company as a laborer, loading and unloading cars, taking grain samples, closing doors and similar work. I have worked for four different grain elevators in the Council Bluffs area and have closed box car doors at each of them. On many occasions, I have found box car doors difficult to close. The standard custom and practice on closing doors was to use a bar and chain, which gives you more leverage to pull the door shut than you can get with your bare hands. One end of the chain would be fastened to the door hasp and the [fol. 357] open end of the chain would be used by putting the bar through it and in that way you get leverage on the chain. I have never had the experience of a box car door falling off in using such a method of closing a car door. I have seen railroad employees use the same method, only they use a five foot wooden pole to close car doors, which gives more leverage.

On the afternoon of February 10, 1953, I was taking grain samples from cars at Kansas Grain elevator. I took samples from Rock Island box car 145287. After doing that, I tried to close the door but was unable to. Plaintiff's Ex- [fol. 358] hibit "D" is a picture of the type of door that was on Rock Island car 145287 on the afternoon of February 10. In closing that door with your bare hands the lever on the lower left hand corner would be pulled down. That raises the door up on its rollers off the track. Then by grabbing the handle in the lower righthand corner, you would bring the door to the left on those rollers. In that way, I moved the door between one foot and two feet I would imagine. After that I got the chain and bar to pull the door with. I attempted to pull it by myself, but did not succeed. Mr. Williams told me as I was going to sample the next car that he would try to shut that door. Mr. Rounds went over to help Mr. Williams. I did not observe them as they were attempting to close the door.

The next thing I knew about it I heard a kind of a sharp snapping, or popping noise, somebody hollered "look out", and I saw Mr. Rounds running one way and the door just barely leaving the car. I ran down to help Rounds and Williams. Mr. Herring and Mr. Rounds were there. The three of us picked the door up and slid it down the track off Mr. Williams. He was lying across the rails on the switch track, north of the track on which the box car was standing. His right leg and the upper part of his body were across one rail and he was lying face down. His right leg was twisted in such a position that anybody could tell that it had to have been broke to lie back that way. He complained of pain in his leg. I moved his foot a distance of about one foot from around the side of the rail and straightened it out back with his body. I could tell there was a bone broken in the leg [fol. 359] when I moved it. Williams was bleeding from his mouth and he complained of his back and his leg.

I saw this car RI 145287 there at the elevator on the morning of February 11, 1953 and examined it. I found that the righthand door post on the car was broken at floor level below the door rail. The weld was broke on the rail at the lefthand door post. The break in the righthand door post as it existed beneath the lower door rail was approximately three quarters of an inch. The siding of the car at the lower righthand corner of that door opening was pulled away from the floor. I mean it was lower. I measured it and it was around three quarters of an inch. Plaintiff's Exhibit "K" shows the condition which I found on the righthand door post beneath the lower righthand door opening of that car. Exhibit "K-1A" is a fair and accurate pictorial representation of the conditions that then existed beneath the lower door track at the righthand door opening of car RI 145287 as I saw it on the morning of February 11. Exhibit "J-1" is a fair and accurate pictorial representation of the conditions that existed at the lower lefthand corner of the door opening as I saw it the morning of February 11, 1953 looking down at the lower lefthand door post. The weld was broken at the door post and pulled away. The break appeared to me to be an old break. The metal was corroded. I saw two breaks in this door opening. One at

the door post and one at the track rail. The break in the door post was at the lower lefthand corner beneath the track on which the door moves. The track rail was visibly apart from the lefthand door post. I don't recall how far. I have worked about elevators in the Council Bluffs area for the last fifteen years and have had an opportunity to observe door openings and the working of the door and track mechanism on various railroad cars.

Based upon your experience and upon your observations do you have an opinion as to whether or not the door and track mechanism as you viewed them after the occurrence [fol. 360] of February 10, 1953, about which you have testified, were in a reasonably safe condition so as not to cause injury to one working about that door and track mechanism?

Mr. Webster: That question is objected to as calling for an opinion and conclusion of the witness, for a self-serving declaration; and invading the province of the court and jury and answering the question to be decided ultimately by the court and jury.

The Court: Well, nevertheless, I think for whatever significance the jury wants to attach to it—they have heard his testimony—they know his experience and the nature of his work. I shall let him answer.

A. Yes.

Q. What is that opinion, Mr. Sigler?

Same objections in which defendants Union Pacific Railroad Co. and Chicago & Northwestern Ry. Co. join, and the same ruling by the court.

A. Well, in my opinion, any car door that doesn't shut manually is not in working order.

Q. What about this particular track door mechanism, was it in a reasonably safe condition?

Same objections and same ruling.

A. Absolutely not.

Cross-Examination.

By Mr. Webster:

I took grain samples out of car RI 145287 that day. To get up into the car to get the grain samples you grab the hasp and make a long step or hop and get up to the door sill of the car, then by whatever kind of footing you can get, you get over the top of the grain doors, then you put your sampler tube over the top of the grain doors and stick it down into the grain. You don't have any occasion to go up [fol. 361] on the stirrups on the ends of the car. I did not observe the condition of the stirrups on this car RI 145287 that day. They never attach the car puller cable or the hook to a car stirrup out there. They hook it to the bolster, the cross beam above the wheels of the car. I have never seen employees of Kansas Grain Company using the car puller to close a car door. I first attempted to close the car door by hand, and after I made that attempt I went and got the chain and bar. I made an attempt to close it with the chain and bar myself, but had no help at that time, and I moved it very little, if any. I didn't have any occasion to put any chain on the lever that lifts the door up. That is never done to my knowledge. I don't know whether Mr. Williams or Mr. Rounds did that on that day. I did not examine the door by looking under the sill of the car. I did not look up at the top of the "C" bar at the top and it appeared to be all right. Just in a matter of seeing if the door was sticking up there. I did not look at the door posts and did not look at the sill or at the point where I later saw these breaks. I didn't make any inspection of the door after I was unable to close it.

Emil Herring, called and sworn on behalf of plaintiff testified as follows:

Direct Examination.

By Mr. Beckman:

I am 57 years old and have worked for the Kansas Grain Company since they came in here, about four or five years ago. Before that I worked for Interstate Grain. I have worked for other grain elevators in Council Bluffs, Iowa.

Part of my work has been closing box car doors. I am familiar with the practices followed in closing box car doors at different elevators. It is a common custom among [fol. 362] employees of the grain elevators in Council Bluffs to use a bar and chain in closing the outer doors on grain cars if they are difficult to close. I am a spout man and double on the scale when the scale man is off. At 4:15 P. M. on February 10, I was closing up the elevator after the day's work. I left the main elevator building at approximately 4:15 or 4:20. I came out of the door to the east of the main elevator building, north of all the tracks. While I was closing the door I heard a noise. A popping sound, metallic, and someone hollered, "look out". I turned around and saw the door falling from the car, and two men trying to get out of the way. I ran to give assistance to these men, and with the help of Mr. Sigler and Mr. Rounds we raised the door off Mr. Williams and slid it down the rail to the east. Mr. Williams was lying there face down with his right leg and his head and the upper portion of his ~~body over the~~ rail of the track immediately north of the one the box car stood on. Mr. Williams moaned very loudly and complained of pain in his back and his leg. The emergency unit arrived between ten and fifteen minutes later and took Mr. Williams away.

The Court: I think I should announce to counsel and to the jury that I find it imperative that I keep commitments that were made for Friday at Davenport. These commitments were made some weeks ago believing that we would be through with this case at that time. We will, however, go through tomorrow, because it is obvious that we cannot conclude in time to submit the case to the jury tomorrow evening, so at the close of our session tomorrow we will recess until Monday morning and then resume the case at that time. In the meantime, we will recess until tomorrow morning at 9:15 and I will ask you to keep in mind the [fol. 363] admonition I have given you before.

(Whereupon court was adjourned at 4:50 P. M. Wednesday, October 12, 1955 until 9:15 Thursday, October 13, 1955, and reconvened pursuant to adjournment.)

CARL A. STUMP called and sworn in behalf of plaintiff, testified as follows:

Direct Examination.

By Mr. Beckman:

I am 52 years of age and am superintendent of the Kansas Grain Company elevator in Council Bluffs. I have been there for four and one-half years. My duties are to manage that elevator. I have worked for several elevator companies in various capacities from grain shoveler to foreman. In working for these various elevators, I have had occasion to close doors on box cars loaded with grain. I have experienced difficulty in closing the doors of some cars. It is the standard custom and practice among elevators to use a chain and bar to get doors closed. I have seen railroad employees use chains and iron bars to get a leverage on a car door. I have also seen railroad employees use a long wooden pole with a chain, and brace the pole behind a door post to get leverage. I have also seen them get on top of the car, one man with a sledge hammer while another man pulled on this long pole or bar with a chain fastened to the door. I have never seen a box car door fall from the car while the door was being closed.

On the afternoon of February 10, some time after four o'clock, I was in the elevator office when one of the boys ran in. The elevator office building is located east of the main elevator structure, in a separate building. This boy came in and said that Mr. Williams had been injured, I ran out the door immediately and when I arrived there the [fol. 364] three men had taken a door from the box car and slid it off Mr. Williams to the east. I went back to the office and told the clerk to call the emergency unit, then I went back to Mr. Williams. He was lying on his face between the rails. When I came back no part of his body was over the rails. I talked with Mr. Williams asking if there was anything I could do for him and he told me what hospital he wanted to be taken to. The boys covered Mr. Williams with coats and put a coat under his head to keep him warm.

On the morning of February 11, 1953, I examined the box car from which the door had fallen the afternoon before.

It was then situated on the second track south of the elevator, south of the office building, and just a little to the east. Facing the car at the lower righthand corner of the door opening beneath the car, beneath the rail that carries the rail of the door, I found that the door post was broken. Above the rail that carries the rail of the door I found that the floor and the rail which carries the door had sunken away from its original position. The lower door track at the lefthand corner of the door opening had been welded at one time and it was broken away and had settled. These breaks that I observed were old breaks. They were corroded. I did not measure the distance of any of these breaks that I observed. I would say that at the lower righthand corner, the righthand door post below the door track; the break was three quarters of an inch. The distance between the side of the car above the door track at the lower righthand corner of the door opening was approximately three quarters of an inch. The break of the lower door track from the lefthand door post at the lower lefthand corner of the door opening was approximately [fol. 365] one-half inch. I had then been superintendent at the Kansas Grain elevator about two years and one half, and Mr. Williams had been employed two years and two months prior to the time of the accident. I had opportunity to observe the type of workman that Mr. Williams was.

Q. What was his reputation with you and with the Kansas Grain Company elevator prior to his injury on February 10, 1953, insofar as his being a good workman was concerned?

Mr. Howland: Objected to as calling for an opinion and conclusion of the witness, irrelevant and immaterial as to any issue in this case.

The Court: He may state as to whether he was able to perform the ordinary duties for which he was employed as a good workman.

A. Mr. Williams was an excellent employee.

Q. Was he steady in his work?

Mr. Howland: Same objections.

The Court: He may answer.

A. Yes.

Q. Was he capable and qualified to perform the work for which he was hired? A. Yes.

Mr. Howland: May we have the same objection stand without repetition, if the court please, to any questions pertaining to the character of Mr. Williams as a worker on this particular job on the ground that it is immaterial and irrelevant, and no bearing upon any issue before the court or jury, and calling for an incompetent conclusion of the witness.

The Court: Do you have any more questions along this line?

Mr. Beckman. No not along that line, your honor.

The Court: Very well.

Q. Had Mr. Williams not sustained injuries in his em-
[fol. 366] ployment on February 10, 1953, what was his future with the Kansas Grain Company elevator insofar as his being employed by the elevator for the rest of his life?

Mr. Howland: The same objections are renewed and further on the ground that it is obviously speculative as to future developments, remote as to any question before the court or the jury, there being no claim, as I understand it, that there was any lifetime contract of employment.

The Court: Well, I think you may state whether or not there was anything in the nature of Mr. Williams' work and the handling of his work to prevent his continued employment so long as he was able to perform the duties proposed.

A. Mr. Williams would have been allowed, as long as he could have performed his duties, to work for the Kansas Grain Company.

Mr. Howland: We move the exclusion of the answer for the reasons urged in the objection.

The Court: Overruled.

I recall Mr. Williams returned to work after he had been injured on approximately July 19, 1954. At that time he did the ordinary work that he had done before. I saw him in the performance of his duties around the elevator.

Q. What is the fact as to whether or not he was capable to carry out his ordinary duties in the course of his employment after his injuries?

Mr. Howland: Objected to as calling for an opinion and conclusion of the witness, argumentative, immaterial and irrelevant.

The Court: The witness may answer if he had an oppor-[fol. 367] tunity to observe, and knows.

A. Mr. Williams, to my opinion, was not able to perform the duties that he had performed before his injury.

Mr. Howland: We move the exclusion of the answer for all the reasons in the objection.

The Court: Overruled.

Q. State the fact whether or not if Mr. Williams had not resigned from his position at that time it would have been necessary for you to discharge him.

Mr. Howland: The same objections.

The Court: You may answer that question.

A. Yes, it would have been.

Cross-Examination.

By Mr. Howland:

Mr. Williams was hired as a workman there at the Kansas Grain elevator. He had no written contract of employment at any time. According to the union contract, in a way, there was a guaranteed wage. That was the contract between the union organization and the Kansas Grain Company with respect to the wages and working condi-

tions at the elevator. The contract had some provisions with respect to seniority. At that time the elevator had approximately twelve men working there. The words "loaders" and "shovelers" refer to the same type of work. Physically that is about the heaviest type of work that we have at the elevator. We have other work there that is not quite so heavy such as scaling, maintenance and oiling. We carried no sweepers on the payroll there. Some elevators have regular sweepers. I have some sweeping work to be done around the elevator, and the crew does [fol. 368] that. When I haven't got work for the regular crew the shovelers, the loading men, the samplers, they all do sweeping. We have one scale man, one sampler. His job is to take the grain sample out of various cars. He helps the grain mixer. The capacity of that elevator down there is approximately one million five hundred thousand bushels. That includes our entire storage capacity in all of those bins.

There is considerable variation with respect to the condition and moveability of box car doors. Some of them move fairly freely while others are more difficult. The condition depends upon a variety of outside conditions. There isn't any generally accepted method in the elevator industry except to do the best you can to get the door closed on a particular car. This inspection of the Rock Island box car which was made on the morning of February 11 was made by me when I came there, later on Mr. Sigler, Mr. Beckman and a photographer came. Mr. Sigler was an employee of mine there at the elevator. Mr. Beckman was there on the morning of February 11 with me and he had a photographer with him. I had made no arrangements for the attendance of a photographer. The number of the car shown in the photograph marked Rock Island defendant Exhibit "4" is the same as the number that was on the Rock Island car that I saw at the elevator. Defendant Rock Island Exhibit "12" is a substantially correct photographic representation of the box car taken at the elevator of the Kansas Grain Company on February 11 and Exhibit "7" is a picture of the doors as it was on the morning of February 11, 1953. Both the righhand and lefthand corners of the doorway opening on Rock Island car 145287 are shown in Rock Island Exhibit "7". Exhibit "5" is a fair

representation of the box car door which came off of that box car. The Channel or angle iron on top of the box car door seems to be shown there. This car RI 145287 was a [fol. 369] steel car. The undercarriage of the car and the beams was of steel. The beams that carry the car run lengthwise of the car. I did not observe the entire underneath portion. I made an inspection only at the door post of the car. There was a beam running lengthwise with the car right under the edge of the car. The door track on which the car door rolls was attached to that beam by brackets and rivets. The brackets would have to be in position if they were riveted to the car. They were in position and there were no rivets out or missing. I said on direct examination that the door post at the right side of the door opening at the lower righthand corner was broken. That door post is shown in the photograph defendant Rock Island Exhibit "7". The break is beneath the door track. The break would be covered by the door track there. That post is attached to this beam that I have referred to. The door track is attached to the side of the car.

I would say that defendant Rock Island Exhibit "7" shows a break or detachment of the door post on the righthand side of the door opening, and also to the lefthand side of the door opening. You can see very plainly that there is a settlement in the track there. There is no evidence of detachment or breakage in the lower righthand corner of the door opening. At the lower lefthand corner you can see a separation of the door track from the door post. The track is not even attached to the door post of the car. The track is attached to the side of the car.

At the time I examined this car, the settling that I have referred to was readily to be seen there just by looking at it. I had no difficulty whatever in finding it just by looking at it.

[fol. 370] Redirect Examination

By Mr. Beckman:

Exhibit "J-1" shows the conditions that I observed at the lower lefthand corner of the door opening when I observed it on the morning of February 11. Exhibit "L-1"

shows the break in the door post on the lower righthand corner under the track as I saw it on the morning of February 11, 1953. The break appears at the lower lefthand corner of the door opening between the door track and the post, a little bit to the left of the center of the photograph. It is indicated by the pen and ink arrow just over the top of the track. An arrow pointing down. I have also placed an arrow pointing to the break in the righthand door post beneath the lower door track. I have placed an ink arrow pointing to the break between the side of the car, the lower door rail and the floor of the car on Exhibit "C" as I observed it on the morning of February 11.

Q. Can you also see the separation of the bottom of the car and the door and track mechanism at the lefthand corner of the door opening, and just past the door? If so, put an arrow on the side of the car pointing down to the break there.

(Witness started to indicate by making an arrow, and the following took place.)

Mr. Beckman: No, not on the door opening. Over here on the side of the car where it points to the separation of the—no, you are getting over here to the inside of the door opening, past the door opening over here into the side of the car.

Q. Will you tell the court and jury whether you can also observe that separation of the bottom of the car and that door track in plaintiff's Exhibit "B" as you view that door track from the easterly end of the car, or the end hav-
[fol. 371] ing the car number on it? Can you see that separation in that picture?

A. No, I can't.

By agreemen between counsel for all parties defendant Rock Island Exhibit "4" was admitted in evidence.

Recross Examination

By Mr. Howland:

The photograph Exhibit "L-1" is a photograph taken from [beaneath] the car at its outer edge and looking up-

ward. The lens of the camera would be pointing at a horizontal angle upward. The break which I have indicated with the arrow on Exhibit "L-1" is beneath the door track. One of the braces and the rivets which I have referred to which support the door track is shown in the photograph Exhibit "L-1". I see no break in the bracket which supports the door track in the photograph. I would say that the portion of the door post which I have referred to as having a break in it has something to do with supporting the door track.

Q. Now, this break being below the door track itself would not affect the horizontal position of the door track with respect to those braces, would it?

A. I dont' quite understand the question.

(The pending question was read by the reporter.)

A. Explain Horizontal.

Mr. Howland: This table is horizontal. It is straight across this way. Parallel to the ground and extending in the same direction.

A. Yes it would have something to do with it.

[fol. 372] A. I see no evidence of any separation in the door track itself shown in the photograph Exhibit "L-1". I can tell by an examination of Exhibit "L-1" that it is the righthand side of the door that is shown in the photograph and the righthand door post. The outer beam of the car beneath the floor on the northerly side of the car is shown in the photograph Exhibit "L-1". That would be the beam on the northerly side of the car extending east and west. The beam is shown by the ink letter "B" on Exhibit "L-1 and the door track is shown by the letter "T".

I did not see any bending in the beam itself beneath the floor of the car. I know what the railroad men refer to as the stirrup on a box car. That is the metal first step below the end of the car, below either a ladder or series of rungs which serve the purpose of a ladder. I did not examine or observe the condition of the stirrup on either end

of this Rock Island box car. I looked at the car door as it lay on the ground. I did not examine the condition of the latch or keeper on the car door.

We have a car puller as a part of our equipment out there at the elevator. A shive is just a large pulley, and it acts as the idler or a guide. We have only the one car puller. A single car can be moved with the car puller just past the loading shed of the elevator out from under the roof. If you have cars on further west you can move a car still further east because you can attach the car puller to the car that is further to the west and shove the car on to the east. [fol. 373] It was the practice down there at the elevator if we had trouble in closing the doors to notify the car checker. There is a Western Weighing and Inspection Bureau man stationed down in that vicinity to look after railroad matters at those elevators down there. The Western Weighing and Inspection Bureau men put the grain doors in these cars at the elevator. The Western Weighing and Inspection Bureau man is separate from the railroad checker. The car checker is located at 32nd Street and First Avenue in that little shack that they have there. He keeps a record of the various cars. When it is impossible to close a car door we notify the checker, because we have loaded grain in these cars and they are coopered with paper doors. If we do not notify the checker that these can't be closed, then we assume the responsibility if the car is broken into, or somebody cuts the paper and lets the grain out on the ground. If we do notify the checker then the railroad assumes responsibility. Prior to the time of the occurrence of Mr. Williams' injury, there had been no notice of any kind given to the checker there with respect to this particular car.

Redirect Examination

By Mr. Beckman:

I only notify the checker when the door cannot be closed.

TED SCHMIDT, called and sworn on behalf of plaintiff, testified as follows,

Direct Examination

By Mr. Beckman:

I am appearing in this case under subpoena. I am not acquainted with the plaintiff W. E. Williams. I am a retired car foreman for the Milwaukee Railroad and worked for that road for forty-eight years and four months. I retired on December 31, 1952. I am a member of the City Council of Council Bluffs, was at one time mayor of that city. While I worked for the Milwaukee Railroad, I held various positions in the car department. I started as a coach cleaner, later was air brake man, inspector, lead car man, car foreman and general car foreman. I have served [fol. 374] as a car repairman on both passenger and freight cars, including box cars used for grain loading. I have had occasion to view and study the construction of box cars. All railroad equipment throughout the country is interchangeable and it is interchanged with the various railroads, and, of course, I would come in contact with various types of railroad cars. I have worked, prior to my retirement, on box cars of the make and construction shown in defendant Rock Island Exhibit "4". The photograph shows the car as stenciled with the built date of February, 1940. That is shown by the figures just below the arrow pointing down on defendant Rock Island Exhibit "4". The type of door shown in Exhibit "D" could be used on the car shown in defendant Rock Island Exhibit "4". The door is mounted upon a rail, the lower rail, and held in position by what we call shoes, that are hooked under the rail. The upper portion of the door is held in position by a door cap which extends down over the edge of the door which is equipped with a guide which goes outside the cap in order to keep the door in a rigid position. That serves as a guide or track to the upper part of the door. I would say that a door like that would extend approximately one inch under the door cap or hood. The function of the door post is to connect the lower underframe with the upper roof section and the purpose is to bind the top to the bottom underframe of the car in a rigid position.

Q. State, if you know, what the effect would be if the righthand door post of the car opening were broken entirely in two beneath the lower door track where the lower door post is fastened to the floor or the underneath beam of the car.

Mr. Howland: Objected to as calling for an opinion and conclusion of a witness on a matter as to which no founda- [fol. 375] tion has been laid. The answer would obviously have to depend on other facts not stated in the question. Not a proper hypothetical question to be propounded to an expert witness without a further showing of facts.

The Court: I will permit him to answer.

A. The breakage of the post would have a tendency to allow the side sill to sag or create an excessive amount of distance between the door rail and the upper door cap.

The purpose of the handle marked with a red pencil on plaintiff's Exhibit "D" is to elevate the door proper on to rollers and permit it to be moved back and forth readily.

Q. Now, Mr. Schmidt, assume a box car of the type shown in Defendant Rock Island Exhibit No. 4 had a complete break in the right door post at a point below the lower door track, and that the lower door track had a complete break from the lefthand door post or door stop at the lower lefthand corner of that door opening, and that the box car was loaded with 112,000 pounds of corn; and further assume that while an attempt was being made to close the door of the side of the car having such a condition, a person who had been holding down on the lever of the door at the lefthand corner thereof let go of the handle and the door fell out from the top; based upon your experiences as a car repairman, car inspector and car foreman over a period of more than forty-eight years of your employment as a railroad man, do you have an opinion as to what would be the cause of the door falling out at the top door track?

Mr. Howland: That is objected to for all of the reasons just previously stated in the objections to the previous interrogatory. In addition, it calls for an opinion and conclusion of the witness on the ultimate issue to be determined

[fol. 376] by the court or jury. Therefore, invades the province of the court or jury; and no proper foundation has been laid, and immaterial and irrelevant. And further, that it is not a proper hypothetical question because it states facts for the consideration of the witness, not shown by the record in this case, and omits important facts which are shown by the record.

The Court. What facts in the question do you consider are not shown by the record.

Mr. Howland: There are quite a number, if the court please. The first one is that there is no showing as to the place at which there is any fastening in the door post. There is no evidence in the record with respect to the broken condition of the door track. The evidence negatives that as I understand the record. Further, there is no showing with respect to the fact that there has been any separation with respect to the door track at the right door post as called for by the question. And further, it does not take into consideration the fact of the application of extraneous force by a continual use of the heavy bar and chain applied by the witnesses who have testified in this case.

The Court: I am going to let him answer for what benefit it will be for the jury. The jury will have the ultimate opinion.

A. Under normal conditions, in closing this car door, the worker would take ahold of this handle and pull it down, which would raise the door upon the rollers. That should raise the door up into the hood. And if the door was moved toward the closing position, and if there was an excessive distance between the lower track and the upper hood, if he let go of that handle the door would naturally drop down upon the door proper itself or off of the rollers, and it would [fol. 377] permit the door to slip out from underneath the upper cap.

I served as a car inspector for the Milwaukee Road for a period of about forty years. The duties of a railroad car inspector are to give a general inspection of the equipment. I have inspected thousands of box cars for grain loading during my work for the Milwaukee Road.

Q. Now, Mr. Schmidt, assume a box car of the type shown in Defendant Rock Island Exhibit No. 4 had a complete break in the right door post of one-half to three-quarters of an inch at a point below the lower door track, and a complete break in the weld between the left door post or door stop and the lower door track where they met at the lower lefthand corner of the door opening; based upon your experiences as a car inspector of box cars to be used for grain loading over a period of forty years, do you have an opinion as to whether such a car would be suitable or okay for grain loading?

Mr. Howland: Just a moment, please. The defendant Rock Island objects because first, the matter is not a proper subject for expert testimony. Second, because the question calls for an opinion and conclusion of the witness on a matter to be decided by the court or jury. Therefore, invades the province of the court or jury. No proper foundation laid. Assumes facts not shown by the record; and immaterial and irrelevant.

The Court: I think I shall let the witness answer for such aid as it may be to the jury. You may answer.

A. I do.

Q. What is your opinion?

Mr. Howland: May we have the same objection?

The Court: Same objection with the same ruling.

[fol. 378] A. It is my opinion that the car should not have been tendered for grain loading.

The Court: You mean it is your opinion that a car in such condition would not be suitable for grain loading?

(Witness nodded his head.)

The Court: Yes, because I will have to strike the other on my own motion.

Mr. Howland: May it be understood that the objection applies to all questions being propounded?

The Court: It may not, but I will strike the answer that the witness made upon my own motion.

Mr. Beckman: Well, what is your opinion as to whether such a car would be suitable for grain loading?

Same objections and ruling.

A. It was not suitable.

Cross-Examination.

By Mr. Howland:

A box car that is thirteen years old is not an antiquated car in railroad usage, assuming it has had no other difficulties. When I retired there were box cars in use that had been built in 1920 and before that. Cars of the type shown in defendant Rock Island Exhibit "4" are constructed with a steel underframe. The underframe has beams running lengthwise of the car underneath it and they are attached by cross braces to the main steel underbeam of the car. The cross ties run from one side of the car to the other. They are long horizontal beams connected with rivets into your main underframe. A car with 100,000 pounds capacity and a load limit of 123,000 pounds would [fol. 379] not be considered overloaded if it was carrying 112,000 pounds of grain. Under the conditions stated, the loading of 112,000 pounds of grain into that car shown on Rock Island Exhibit "4" would bend the underframe or cause it to sag. Under normal conditions, it would not.

I am familiar with the manner and method by which the door track on the Rock Island series 145 box cars is attached to the frame of the box car. The door track is fastened to brackets which are also fastened to the side of the car. To one of the horizontal members. The door track is usually fastened with brackets not to exceed 24 inches apart. The bracket is fastened to the beam with heavy rivets. As long as the door track is held by those braces, there, under normal conditions there would not be any sagging of the door track.

Q. What is there about the fact, if it be a fact, that there is a breaking in the door post way beneath the door

track itself that would have any effect in causing the door track to get out of alignment or bend?

A. The door track is fastened to the side sill. The side sill is held in position by the door post. And with a fracture in the door post, it would allow the sill and track in its entirety to sag.

I have already stated that the track is supported by heavy brackets spaced twenty-four inches apart and those brackets are attached to the side sill or beam. What I mean to say and tell the jury is that this door post at the side of the door supports the sill of the underframe of the car. The application of pressure by means of a heavy crow bar at the rear end of the door with the extreme weight of the load against the underframe of the car, the bar wouldn't have a great deal of effect on furthering of the opening or closing of the door. It would depend on the [fol. 380] amount of pressure exerted. I don't believe that pressure with a crow bar an inch or better in diameter in the hands of a husky man would affect the position of the tongue or the upper portion of the door. If pressure is [fol. 381] exerted by means of placing the point of the crow bar against the side of the steel car at the point where the plates are riveted together as shown in Rock Island Exhibit "4", and the pressure is applied between the door and the side of the car there could be some exertion placed upon it there, and depending on the quantity of the pressure, that will affect the upper part of the door where the angle iron or hood is.

Mrs. W. E. Williams called and sworn on behalf of plaintiff, testified as follows:

Direct Examination.

Mr. Williams and I have been married about thirty-four years. When we were married, Mr. Williams worked for the Ford Motor Company, and was there for fourteen years. In 1932 he was laid off. They were shut down and he had a hard time then getting a job. He got an old truck and went out and cut timber into stove lengths and sold it for $4.00 a cord until he could find something else. He cer-

tainly tried to get a job and was working most of the time. Even during the depression, he never did seek general relief from the state. Most of the time he was working on two jobs. When he worked at Ford's he would repair cars and truck for friends, and things like that. Prior to his injury on February 10, 1953, Mr. Williams' health must have been pretty good—the work he did. Even when he was farming, when the summer work was over he would work in the elevators, or worked at construction work through the winter, and would pick corn on weekends and Sunday when he got home from work.

It was about 4:30 on February 10, 1953 that Mr. Stump called me and said that Mr. Williams had been injured. My daughter is a nurse and she went to the hospital, and I didn't go up until after about 7:00 o'clock. Mr. Williams [fol. 382] was under the influence of dope then. He was moaning. He was lying in bed with a big roll under his back and had bags piled up to support his leg. I saw him about every day he was in the hospital. He had a blood clot later. He was in the hospital I think for seventy-two days and was then brought home. We have an apartment rented upstairs in our home, and I have done baby sitting. I took care of Mr. Williams in the day time after he was brought home and my daughter, the nurse, helped me at night. He had a cast extending from his chin down to the lower part of his stomach and a long cast on his right leg.

Q. Now after Mr. Williams was released to go to work, state, if you know, whether or not he tried to obtain work?

A. Yes, he did.

Q. Explain to the court and jury what effort he made, if any?

Mr. Howland: That is objected to. It is obviously based upon matters of a hearsay nature, and immaterial and irrelevant. It is repetitious, and it certainly adds nothing to the case.

The Court: It is a matter that seems to me has been very fully developed, but you are at liberty to interrogate this witness as to matters she knows even though it is repetitious.

Q. Do you know whether Mr. Williams has made every available effort within your knowledge to obtain employment since he has been released by the doctor?

Mr. Howland: That is objected to as calling for hearsay, calling for an opinion and conclusion of the witness, and no foundation laid.

The Court: If she knows, she may answer?

A. I do know he registered over in Omaha and registered here, and every afternoon he would get the paper as [fol. 383] soon as it come and look it over and see if there was anything there he thought he could get. We borrowed the Omaha World Herald. He worked when there have been jobs offered to him but there wasn't very many that wanted him.

At this point, court recessed at 11:50 a. m. until 1:45 p. m. and reconvened pursuant to adjournment.

Plaintiff rests.

At the close of plaintiff's evidence in the absence of the jury defendant Chicago, Rock Island and Pacific Railroad Company interposed the following motions:

Mr. Howland: Comes now the defendant Chicago, Rock Island and Pacific Railroad Company, at the conclusion of the plaintiff's evidence, plaintiff having rested and so announced in open court, and moves the court to instruct the jury in this cause to return its verdict in favor of the defendant Chicago, Rock Island and Pacific Railroad Company, and in support thereof states and shows the court as follows:

1. That there is no evidence whatever before the court and jury at this time which establishes or tends to establish that the defendant Chicago, Rock Island and Pacific Railroad Company was under any duty or obligation either to Kansas Grain Company or to the plaintiff in this action with respect to the condition and state of repair of Rock

Island box car 145287; that the record in this case shows only that said box car was one owned by Chicago, Rock Island and Pacific Railroad Company, and that same was made available to plaintiff's employer for loading by defendant Rock Island; that the evidence affirmatively shows that there was not at any time as between defendant Rock Island and plaintiff, or his employer, any relationship such as that of a common carrier and shipper, or otherwise which would impose any duty of any kind upon the named defend-
[fol. 384] ant to exercise care with respect to plaintiff. Further, that the evidence in this case affirmatively discloses that the billing of car RI 145287 was via the line of Union Pacific Railroad Company, and that said defendant was the only one of the three defendants as to whom any relationship of carrier and shipper arose as between the defendants and the Kansas Grain Company, the employer of the plaintiff.

2. That the evidence is insufficient to establish any act or omission which would constitute negligence on the part of the defendant Chicago, Rock Island and Pacific Railroad Company with respect to box car RI 145287.

3. That the evidence of the plaintiff, and all of the inferences to be drawn therefrom as a matter of law, is insufficient to establish that any act or omission of the defendant named could be found by the jury to have been the proximate cause of the injury and damage claimed to have been sustained by plaintiff.

4. That the evidence of the plaintiff affirmatively estab-
[fol. 385] lishes that plaintiff by his own acts contributed to the injuries and damage for which recovery is sought in this action.

5. That upon the whole record the evidence is, as a matter of law, insufficient to establish any liability on the part of the defendant Chicago, Rock Island and Pacific Railroad Company, and if under the present state of the record the jury were to return a verdict against this defendant it would be the duty of the court to set the same aside as being without substantial support in the evidence.

The same defendant as an alternative motion, and subject to the ruling of the court on the foregoing motion for a

directed verdict, now moves the court to withdraw from the consideration of the jury the following assignments or specifications of negligence found in paragraph 11 of the complaint of plaintiff in this action:

We move the court to withdraw from the consideration of the jury specification (b) for the reason that the same is a mere general catchall allegation of negligence; is not supported by the record. The record is insufficient to justify any recovery upon specification (c) for the reason that the evidence discloses no duty or obligation on defendant Chicago, Rock Island and Pacific Railroad Company with respect to giving plaintiff notice of any defects in the door track mechanism of the car.

The same ground with respect to specification (d); same ground with respect to specification (f); the same ground with respect to specification (g); the same ground with respect to specification (h); being a mere generalization and not being a pleading of any specific negligence; the same ground with respect to specification [illegible]; the same ground [fol. 386] with respect to specification (j); the same ground with respect to specification (k); the same ground with respect to specification (l); and the same ground with respect to specification (m).

Subject to the ruling of the court on the motion for directed verdict, we also move the court to withdraw from the consideration of the jury in its entirety Count II of the plaintiff's complaint in this action for each and all of the following reasons, to-wit:

1. That Count II, or Division II of plaintiff's complaint, is predicated upon and relies upon the doctrine of res ipsa loquitur, which under the record is wholly inapplicable as against any of the defendants, and specifically including defendant Chicago, Rock Island and Pacific Railroad Company; further that the evidence affirmatively shows that the instrumentalities which plaintiff claims produced his injuries were under the control of plaintiff and his co-workers, and his employer, and not in the control of the defendants or any of them; that the evidence of the plaintiff affirmatively discloses that the case is not a proper one for the application of the rule of res ipsa loquitur, and that the

evidence is wholly insufficient to support a recovery as against the defendants or any of them upon the basis set forth in Division II of plaintiff's complaint.

As an additional motion to be made at this time, and subject to the ruling of the court on the foregoing motions, we desire to move the court to strike from plaintiff's evidence in this case all of the testimony given by the witness, Doctor Blanchard, with respect to so-called Kimmel's disease, for each and all of the following reasons, to-wit:

That the evidence was and is entirely speculative, remote, contingent and uncertain; is not based upon an ex-
[fol. 387] amination of any of the x-ray plates except certain ones taken long prior to the trial of the action; that there is no showing whatever upon which the jury would be justified in making any award of damages to plaintiff based upon the evidence of the said Dr. Blanchard, or that the same was proximately brought about by the injuries sustained, of which complaint is made as against the defendants in this action.

Mr. Davis: Comes now the defendant Chicago and Northwestern Railway Company, the plaintiff having rested, and moves the court to instruct the jury to return a verdict in favor of the defendant Chicago and Northwestern Railway Company and against the plaintiff, and as grounds therefor states:

1. That under the pleadings and the evidence in this case, the plaintiff has failed to establish as a matter of law (a) that this defendant owed any obligation or duty toward the plaintiff herein. (b) That this defendant breached any obligation or duty owed to the plaintiff herein. (c) That this defendant was guilty of any negligence which could be a proximate cause of the plaintiff's injury.

2. That under the pleadings and the evidence in this case, it is affirmatively established as a matter of law (a) that this defendant owed no obligation or duty toward the plaintiff herein. (b) That this defendant breached no obligation or duty owed to the plaintiff herein. (c) That this defendant was guilty of no negligence which could be a proximate cause of plaintiff's injury.

3. That as a matter of law the plaintiff has failed to meet the burden of establishing his own freedom from negligence contributing proximately to his injury.

4. That as a matter of law it is affirmatively established [fol. 388] that the plaintiff was guilty of contributory negligence as a matter of law.

5. That if the court submitted plaintiff's claim for personal injuries to the jury as to this defendant, and the jury returned a verdict in favor of plaintiff and against this defendant, the court would be required as a matter of law to set the verdict aside as being contrary to the evidence and the law applicable thereto.

And at this time, your honor, I also would like to make a motion in respect to the cross claims.

The Court: Very well.

Mr. Davis: Comes now the defendant Chicago and Northwestern Railway Company and moves the court to dismiss the cross claim of the defendant Chicago, Rock Island and Pacific Railroad Company against this defendant, and urges as grounds therefor the following:

1. That the cross claim of the Chicago, Rock Island and Pacific Railroad Company is predicated upon terms of certain contracts between the two defendants referred to in the cross claim of the defendant Chicago, Rock Island and Pacific Railroad Company.

2. That under the evidence in this case, if there is any liability to the plaintiff herein, said liability is based upon the sole negligence of the defendant Chicago, Rock Island and Pacific Railroad Company, or the sole negligence of the Union Pacific Railroad Company, or both of them, for which the Chicago, Rock Island and Pacific Railroad Company is not entitled to indemnity from this defendant.

Comes now the defendant Chicago and Northwestern Railway Company, and moves the court to dismiss the cross claim of the defendant Union Pacific Railroad Company against the Chicago and Northwestern Railway Company, [fol. 389] and as grounds therefor states:

1. That the cross claim of the defendant Union Pacific Railroad Company against this defendant is predicated upon allegations that if it is held liable to the plaintiff herein it will be only because of primary, active, or positive negligence of this defendant or that of the defendant Chicago, Rock Island and Pacific Railroad Company.

2. That the evidence affirmatively establishes in this case as a matter of law that this defendant owed no duty to the plaintiff, was guilty of no negligence, either primary or secondary, and that if the defendant Union Pacific Railroad Company is held liable to the plaintiff, it would not be so held because of any negligence of this defendant, or any breach of duty owed by this defendant to the plaintiff.

Mr. Anderson: The defendant Union Pacific Railroad Company moves the court at the close of the plaintiff's evidence, plaintiff having rested, to direct a verdict in favor of this defendant and against the plaintiff for the following reasons:

1. The evidence is insufficient as a matter of law to sustain a verdict in favor of the plaintiff and against this defendant.

2. No evidence has been offered or received at the trial tending to prove that this defendant was guilty of any negligence whatsoever, either separate or jointly with the other defendants, or either of them, causing or contributing to cause said accident whatsoever.

3. The evidence affirmatively shows that the proximate cause of the said accident, and injury resulting therefrom, was not any negligence of this defendant, either separate or joint or concurrently with the other defendants, or either of them.

[fol. 390] 4. Plaintiff has failed to sustain his burden to show that he was not guilty of negligence causing or contributing to cause said accident.

5. The plaintiff has failed to sustain his burden of proof to show that this defendant owed any duty or obligation whatsoever to the plaintiff or Kansas Grain Company, either separate or jointly or concurrently with the other

defendants, or either of them, or that this defendant breached any such duty or obligation.

6. That if the court submitted plaintiff's claim for personal injury to the jury, and the jury returned a verdict in favor of the plaintiff, against this defendant, the court would have, as a matter of law, to set the verdict aside as being contrary to the evidence and the law applicable thereto.

Comes now the defendant Union Pacific Railroad Company at the close of the plaintiff's evidence, the plaintiff having rested, and moves the court to direct a verdict in favor of this defendant and against the Chicago, Rock Island & Pacific Railroad on its cross claim against this defendant for the following reasons:

1. The cross claim fails to state a claim against this defendant upon which relief can be granted.

2. The evidence is insufficient to sustain a verdict in favor of the cross claimant against this defendant.

3. If the accident to plaintiff was negligently caused by any defendant, the primary negligence was that of the cross claimant Chicago, Rock Island & Pacific Railroad Company.

4. The evidence affirmatively shows that this defendant was not guilty of any negligence whatsoever, primary, or [fol. 391] otherwise, causing or contributing to cause said accident.

A motion for a directed verdict against the cross claim of the Chicago & Northwestern Railway Company.

Comes now the defendant Union Pacific Railroad Company at the close of plaintiff's evidence, the plaintiff having rested, and moves the court to direct a verdict in favor of this defendant and against the Chicago & Northwestern Railway Co. on its cross claim against this defendant for the following reasons:

1. The evidence is insufficient to sustain a verdict in favor of the cross claimant against this defendant.

2. If the accident to plaintiff was negligently caused by any defendant, the primary negligence was that of the cross claimant Chicago and Northwestern Railway Company.

3. That the evidence affirmatively shows that this defendant was not guilty of any negligence whatsoever, primary or otherwise, causing or contributing to cause said accident.

The Court: Well, as to all of these motions, the court at the present time will overrule them, except perhaps I should rule as to the motion of the defendant Rock Island to withdraw Count II. I think that should be withdrawn.

Following a discussion between the court and Mr. Beckman the court stated: "Well for the present, I will reserve [fol. 392] my ruling on it, and as to the others, I will deny them at this time and tell all of the defendants that that is without prejudice to their right to renew the motions as they desire."

During the absence of the jury from the court room the following occurred:

Mr. Howland: Before the jury is called in we have some matters of admissions that were called for, and I think, perhaps, if we have a few moments that we can make a record on those in much the same manner as was done with respect to the plaintiff's request for admissions. I believe we can save some time.

Defendant Chicago Rock Island and Pacific Railroad offered its Requests For Admissions of Facts 1 to 5 inclusive and no objections were made by other parties.

Mr. Webster: This defendant offers paragraph 6 of its request for admissions.

Mr. Anderson: Let the record show that defendant Union Pacific objects to paragraph 6 of defendant Rock Island Company's request for admissions for the reason that the request is not material, not relevant to any issue in this case, not relevant as to any issue between the Rock

Island and the plaintiff, and not relevant as to any issue made up by the pleadings as between defendant Rock Island and this defendant.

The Court: I will overrule the objections.

(Chicago & Northwestern joins in the objections of Union Pacific)

Mr. Beckman: Let the record show that the plaintiff has no knowledge of the facts set out therein and no means of [fol. 393] acquiring that knowledge, all as stated in the answer to that interrogatory, and therefore, denies same.

Mr. Webster: You said you neither admit or deny it. Under the record your Honor, made at the time of the assignment, I believe plaintiff's counsel stated that in such cases as he neither admitted nor denied the facts it would be deemed admitted insofar as it was admitted by the other defendants, and he also stated that that is the law, which I believe it is.

The Court: So far as plaintiff is concerned I think it makes no difference whatever. I would consider it irrelevant, and even though the objection was not so made. So far as the claims between the parties are concerned, the party defendants, if no issue has been made on it, then I was in error in overruling the objection.

Mr. Howland: Now before your honor does finally rule on this matter, I want to point out how very relevant in my judgment, and how material this subject covered by our request for admission No. 6 is. Our theory with respect to the plaintiff's case, with respect to our cross claim, with respect to the cross claims against us, is that at all times the defendant was acting, the defendant Rock Island, was acting as a terminal switching railroad and not as a common carrier. In other words, we were being paid for the service we performed with respect to Rock Island car 145287 by the Union Pacific Railroad, and were acting as the agent for that railroad; that during all times that the car was in the possession of the plaintiff's employer, and that is admissible under our denial that we were guilty of any negligence

as to the plaintiff in this particular action. We deny that we [fol. 394] were negligent. We say we were under no duty or obligation to the plaintiff, and that is based on the proposition in handling that car that we were handling it as the agent for the Union Pacific Railroad, and we are going, with the court's permission, to introduce proof along that line.

The Court: Well, you may introduce proof along that line when the time comes, but this court is not going to make a determination of that kind as a matter of fact, because that is a question for the jury as to what your relationship was to the plaintiff in this action.

Now, whatever the relationship may have been between you defendants, I am not going to allow the incidence of your internecine war to deprive the plaintiff of his rights before this jury.

Mr. Beckman: It is absolutely irrelevant to us. If Mr. Howland is an agent, he would be as liable to us as an agent as he would be a principal.

Mr. Anderson: And if Mr. Howland is taking the position that what they did was as the agent of the Union Pacific, they are liable to us as our agent if we are required to pay anything.

Mr. Beckman: He has never in any of the pleadings to the plaintiff alleged that he was an agent. We don't care whether they are agents or principals. The action arises ex delicto. A railroad furnishing a car has a duty as stated in our brief.

Mr. Anderson: I want to make one other point. As a matter of fact, the Rock Island has no place that I know of alleged that they were acting as the agent of the defendant Union Pacific Railroad Company except in connection with switching operations which took place after the loading of the car, and from the Kansas Grain Company to the [fol. 395] pool yard in Council Bluffs. There is no pleading along that line.

Mr. Howland: The cross claim of the Rock Island against the Union Pacific and against the Northwestern is replete with allegations of that character.

The Court: I am going to take the position that so far as this plaintiff is concerned, that request No. 6 is not admissible. If you have evidence that you want to offer when the time comes, as between the defendants, or among the defendants themselves, if there should be a verdict against some one or more of them, that will be all right. I am not going to allow this plaintiff's rights to be cluttered up with that controversy. I am not going to confuse the jury with it and I can see nothing but confusion to result so far as the jury is concerned.

Mr. Howland: Do I understand the court that no requests for admissions, and no evidence concerning the relationship between the defendants with respect to this particular car—

The Court: Well, there is no issue if Mr. Anderson is correct in his statement. Is he correct that there is no issue in support of your claim that you were acting as agent for Union Pacific?

Mr. Howland: We deny that we were under any duty [fol. 396] or obligation to the plaintiff. We specifically deny that we were guilty of any negligence. We specifically set out in our pleadings that we owed no duty to plaintiff in this action. Under that state of the pleadings we are entitled to offer evidence as to what our relationship to the transaction was.

The Court: I expect to allow all parties defendant to show their relationship to the ordering, movement, placing and displacing, if you please, of this car. I am going to do that.

Mr. Webster: One of the points here on that is that both defendants apparently admit the facts requested in our No. 6. The plaintiff neither admits nor denies, and the legal effect of that is that he admits it. Therefore, there is no use of the defendant Rock Island offering any evidence on the point if the court's ruling is that it is irrele-

vant. This request for admission is offered in the attempt to expedite the trial of this case. I don't understand that this is denied specifically by any of the parties, but is only objected to as irrelevant. Is that correct?

Mr. Anderson: I made a good many more objections to it into the record, but there is no denial of the fact.

The Court: Well paragraph 6 is a matter that is purely a quarrel between the defendants and for the present I am going to deny to the defendant Rock Island the right to read that as an admission to the jury.

Mr. Webster: Defendant Rock Island offers paragraph 7 of its request for admissions.

Mr. Anderson: To which the defendant Union Pacific Railroad Company makes the same objection we made to [fol. 397] the offer of defendant Rock Island's request No. 6.

(Chicago and Northwestern joins in the objections of defendant Union Pacific.)

Mr. Beckman: Plaintiff has no knowledge of these facts, your honor, other than they appear wholly irrelevant as between the plaintiff and Rock Island.

The Court: The ruling will be the same as on the other.

Paragraphs 8 and 9 of the request for admissions are offered without objections.

Mr. Webster: Paragraph 10 of the request for admissions is offered by this defendant.

Mr. Beckman: Plaintiff objects as being irrelevant.

Mr. Anderson: Defendant Union Pacific objects to it as immaterial.

The Court: I fail to see its materiality. The question is whether you furnished the one here involved.

Paragraphs 11, 12, 13 and 14 and the first sentence of paragraph 15 of defendant Rock Island's request for admissions are offered and received without objections.

Mr. Webster: This defendant offers paragraph 16 of its request for admissions.

Mr. Beckman: Plaintiff objects to paragraph 16 for the reason that it is immaterial and irrelevant insofar as it refers to other cars such as the cars that were unloaded and made empty at the elevator. That has no reference to the car here in controversy, and would have a tendency to confuse the jury.

The Court: In the circumstances, I shall sustain the [fol. 398] objection as to 16.

Mr. Anderson: We join in the objection. (Chicago & Northwestern joins in the objection.)

Mr. Webster: This defendant offers paragraph 17 of its request for admissions.

Mr. Anderson: As to paragraph 17 defendant Union Pacific objects on all the ground urged to paragraph 6 and 7 of the defendant Rock Island's request for admissions, and the further objection that as between the plaintiff and defendant Union Pacific there is no issue based on any matter to which paragraphs 6, 7 or 17 would have any relevancy.

Defendant Chicago & Northwestern joined in the objections of Union Pacific.

[fol. 399] Mr. Beckman: It is true, and we have admitted in the request for admissions, that some cars that are brought in there loaded, are unloaded, moved forward on the unloading track, switched over to the loading track, and are loaded with grain. Now, this particular car, there is no dispute between the parties but that it was brought in there by the Northwestern the morning of his accident, or during the night or early morning of the accident, and was not one of those cars that they use in the trade as being "made at the elevator". We don't want this jury to be

confused on that issue. However, we do not wish to prevent these defendants from properly presenting their cross claims as against each other, so if there is some way that the court can keep that matter straight on instructing the jury, we would have no objection, and I mean insofar as any of our objections are merely for the protection of the plaintiff in this case.

The Court: Well, I may suggest to you that if at the close of all of the evidence I consider that the case is one for submission to the jury, I am going to submit it to the jury to determine what defendant is liable, or whether all of them are liable, or one or more, whatever it may be. That will not deprive the defendants of the right as among themselves, if an adverse verdict is returned, to come into this court and move for judgment, and to try to determine the order of liability as may be contemplated by the statutes of Iowa, for example, as illustrated in the Hoskins case. Consequently, I am not going to instruct this jury that it will determine the cross claims as between these several defendants. I am not going to confuse them with that. I consider that that is a matter for my determination if it will have happened that I will have had to submit this case to the jury and a verdict will have been returned against one or more defendants. If only against one, never-
[fol. 400] theless, still the matter may be open for motion, but if against two or more defendants, it may be a question as to the order of liability. And of course, the right will be reserved to all defendants for motions for judgment notwithstanding the verdict, but I am not going to clutter up this record with the determination of the liability of whoever, if anyone may be liable if this is to be submitted to the jury, to this plaintiff, with the cross claims between these defendants. That I will determine later myself. Does that answer your question?

Mr. Howland: I think it answers the question that I had in mind, if the court please. The only thing that occurred to me is that I had assumed this case was to be tried by one jury, and if there are issues of fact—

The Court: Now these issues of fact that are to be determined here under my instructions are going to be the

issues of fact as to the liability of whoever—whether one or more of the defendants may be liable to this plaintiff. Someone owed a duty to this plaintiff. We are going to have to assume that other case won't go to the jury.

Mr. Howland: That's right.

The Court: Let me go back. If I sustain all of the motions that were made here today the plaintiff would be out on the street.

Mr. Howland: That is correct.

[fol. 401] The Court: If the defendants are all right in their contentions, then there is no duty that anyone owed of which this plaintiff is the beneficiary. I think there was a duty owed to the Kansas Elevator Company to furnish a car that was reasonably safe for the purpose for which it was intended to be used, and that this plaintiff is the beneficiary of that as an employee of that company. Consequently, if there was a breach of the duty, and as a result of that the negligence was the proximate cause of the injuries to this plaintiff, the jury is going to be given an opportunity so to determine. Now, as between the defendants, however, when the time comes, I consider that it will be for the court to determine the order of liability of these defendants.

[fol. 402] Mr. Howland: The question which occurs to my mind, and I don't want to press the matter unduly, is simply this, if the court please, and that is that as to issues of fact, unless the parties have waived a jury trial on the issues as between the defendants on the cross claims, the parties have also the right of a trial by jury unless it be waived, and there has been no waiver by anyone. Now we haven't made a demand, that is true. Maybe we have waived that, but I had assumed that when the plaintiff filed his action and demanded a jury trial that that necessarily meant that there would be one jury trial and that the court would then—

The Court: Well, you wouldn't necessarily assume that the demand of plaintiff for a jury trial would confer upon

each of you the right to have a jury trial as to each defendant, because his demand was for the benefit of the plaintiff.

Mr. Howland: Well, I have stated my position as well as I can.

The Court: Let us go on with these. In respect to 17, the court will allow 17 to be read to the jury.

Paragraphs 18, 19, 20, 21, 22, 23, (amended as hereinafter shown) 25, 26, 27 and 28 of defendant Rock Island's request for admissions were offered and received without objection.

Following an off-the-record discussion, the following took place:

Mr. Davis: May the record show that I have now delivered to Mr. Howland the switching order referred to in paragraph 24.

Mr. Howland: And it is agreed between all parties that in connection with the reading of request for admission number 24 the so-called switching order or routing of February 11, 1953, headed "Lathrop Grain Corporation" may be offered in evidence subject to relevant objections.

[fol. 403] Mr. Webster: Paragraph 29 of this defendant's request for admissions is offered.

Plaintiff objects as irrelevant due to the fact that the contract relationship has nothing to do with this accident.

Mr. Howland: Well, of course, if the court please, that goes to the very heart of the law suit here as to which one of the defendants assumed the obligation to the plaintiff and became primarily responsible to the plaintiff by reason of the use of this car in transportation service between the elevator of Kansas Grain Company in Council Bluffs and the destination at Denver, Colorado.

Mr. Anderson: Defendant Union Pacific Railroad Company objects to the admission in evidence of the material

requested in paragraph 29 of the defendant Rock Island's request for admissions as utterly immaterial, and for the reasons set forth in objections to 6, 7 and 17 of the request for admissions.

At this point, the court inquired whether the request has to do with the movement of the car after February 23, 1953 and the fact that the Union Pacific received the freight charges for transporting it. After his, the following colloquy occurred:

The Court: Was there some participation by the Rock Island?

Mr. Howland: Absolutely not, except that we perhaps should have gotten a $4.86 switching charge, to be paid not by the Kansas Grain Company or the consignee, but by the Union Pacific.

Mr. Anderson: And actually, of course, the fact is that during the period of transit from Omaha to Denver, Colorado, the Rock Island was in fact paid a per diem charge for each day that the said car was in transit, if you want to talk about the receiving of it.

[fol. 404] Mr. Howland: We were paid a per diem charge, and of course assumed the burden of paying for repairs on the car. There was no participation in the through rate which the Union Pacific got for hauling grain.

Mr. Anderson: My point is, primarily the question of who got the revenue is utterly immaterial to the question of liabiilty in the case.

Mr. Howland: And I think that is the most important factor.

The Court: I have decided that I am going to allow the handling of this car to be shown. That is, the fact that it moved over the repair track and then underwent other repairs, and moved out on the 24th, I believe it was, of February, to its destination. I am allowing that to be shown simply to show the whole movement of the car for the purpose of showing the relationship of all of the defendants

to it. I don't know that the matter of who got the freight, or who didn't makes any difference whatever, but I do consider that the handling of the car is a matter about which they are entitled to know.

Mr. Webster: Therefore, the court's ruling is that all that portion of the paragraph following the words "Denver, Colorado", will not be admitted, is that correct.

The Court: Yes. The rest I consider irrelevant.

Defendant offers paragraphs 30, 31, 32 (as amended as hereafter shown) 33 and 34 of its request for admissions to which offers plaintiff and defendant Union Pacific object as immaterial and irrelevant. The court indicated that such objections would be overruled. Defendant Chicago, Rock Island & Pacific Railroad Company then offered paragraph 36 of request for admissions. It was agreed that identification of the booklet designated "Code of Per Diem Rules of Association of American Railroads in effect Jan-
[fol. 405] uary 1, 1953" and of the "Council Bluffs-Omaha and South Omaha Per Diem and Reclaim Rules revised May 1, 1950", would be waived.

At this point defendant Rock Island withdrew offers of Requests No. 34 and 35.

To the offer of paragraph 36 of the request for admissions, plaintiff and defendants Union Pacific and Chicago and Northwestern objected as immaterial.

The following statement was then made by Mr. Howland:

"To clarify the position of the Rock Island, I wish to state that it is our purpose and we intend to offer proof, that in connection with the furnishing of cars to the Kansas Grain Company elevator in Council Bluffs for outbound loading, those cars are for practical purposes pooled at the elevator and that the furnishing of the car is no indication of the line-haul carrier which will receive the billing on the car, that such fact is known to all railroad companies doing business with Kansas Grain Company and that it was the custom and usage accepted by the rail-

roads and by Kansas Grain Company that if specific orders were placed with a particular railroad company for cars for outbound loading, whether those cars were billed over the railroad furnishing the cars, others, at least equal in number, were billed out, which may have been supplied by other railroad carriers serving the Omaha-Council Bluffs area; and in that manner each railroad company accepted billing on cars tendered to it irrespective of which particular carrier may have supplied the car on order from the the elevator company".

The Court: We will sustain the objection and permit you to make the offer.

Mr. Webster: We will withdraw the offers of Paragraphs 37, 38 and 39 of defendant Rock Island's request for admissions in view of the previous ruling of the court.

[fol. 406] At this point, a short recess was taken and the trial of the cause was resumed at 4:00 o'clock p. m. on Thursday, October 13, 1956 and the following proceedings were had:

Fred Neubaum called and sworn on behalf of the defendant Chicago, Rock Island and Pacific Railroad Company testified as follows:

[fol. 407] Direct Examination

By Mr. Webster:

I am a commercial photographer located in Omaha. In early February, 1953, I took some photographs of Rock Island box car No. 145287 near the Kansas Grain elevator in Council Bluffs and also in the Rock Island yards. I took defendant R.I. Exhibit No. 10 on February 12, 1953. The lettering 145287 shown in the lower lefthand corner of the picture as a chalk mark was placed there by me as a reference to identify the car number which could not be shown in the photograph. The photograph was taken between 1 and 4 p.m.

Defendant Rock Island offers in evidence its Exhibit No. 10.

(Examination by Mr. Beckman)

I took this picture for Mr. Burrell who is claim agent for the Chicago, Northwestern Railway Company. I do not know that this car was removed from the Kansas Grain elevator on February 11, 1953. I know that the picture was taken on February 12, 1953. I would say that it was taken in the vicinity of the Kansas Grain Company elevator on the afternoon of February 12, 1953. I don't think that the car was on the repair track of the Rock Island Railroad at the time the picture was taken.

The offer of defendant Rock Island Exhibit No. 10 was objected to by plaintiff in that the record shows that the car was released from Kansas Grain Company on February 11, 1953, the testimony of the witness is inaccurate and the photograph was taken at a time too remote to show the car was in the same condition as at the time the injuries were sustained by plaintiff. No ruling was made upon this objection.

[fol. 408] (Examination by Mr. Webster continued)

I took some photographs of this car at Kansas Grain elevator and I also took some at the Rock Island repair track. Defendant R.I.'s Exhibit No. 10 was taken either at the elevator or at the Rock Island repair track. At this time, I have some difficulty in remembering exactly where it was taken.

The Court: Is there a legend on there that shows when it was taken?

Mr. Webster: The legend is that it was taken on February 12 and the record does show, that on the evening of the 11th the car was removed.

The Court: That was shown in the admissions.

Mr. Webster: We will by later testimony shows the fact that this car had not had work done on it aside from its

removal, and with that offer to connect that testimony up, defendant Rock Island offers its Exhibit No. 10 in evidence.

Mr. Beckman: The same objections.

The Court: I am not going to admit it on the evidence of Mr. Neubaum.

The Witness: I also took defendant Rock Island Exhibit No. 8 on February 12, 1953 which shows a box car door on a track and correctly [protrayed] the condition of the object shown at the time I took the picture. I also took defendant RI Exhibits 9 and 3 on that same date and they correctly [protray] the objects shown. I put the writing on the car door in chalk "R.I. 145287" before I took the photograph defendant Rock Island's Exhibit 3.

I took defendant Rock Island Exhibit No. 11 on Febru-
[fol. 409] ary 13, 1953, the day following the previous photograph I have testified about. All these photographs were taken in natural light with an eight by ten Eastman view camera. All of the photographs I have testified about are contact prints. I also took defendant R.I. Exhibit 14 on February 13, 1953 and it correctly [protrays] the scene depicted therein. It is a contact print.

Cross Examination

By Mr. Beckman:

I took all of these exhibits of defendant Rock Island 9, 8, 3, 14 and 11 for Mr. Burrell. No one else was present except Mr. Burrell and myself, as I recall. He pointed out to me the objects that he wanted shown. Mr. Burrell generally tells me what he wants the pictures taken of and he may have told me to put the car number on there. I have taken pictures for different railroads for about 28 to 30 years involving accidents, or accident locations. I do not recall now exactly where the Rock Island yards are located; it was all railroad tracks and that is all I know. I know the pictures taken on February 12 and February 13 were the same car but I did not pay any attention to the surroundings or other objects and so I don't know exactly where the car was located when any particular picture

was taken; I just know I took some pictures at Mr. Burrell's direction. I don't know anything about where the objects came from that I wrote the numbers on.

Redirect Examination

By Mr. Webster:

Defendant Rock Island Exhibit No. 4 was taken by me on February 12, 1953. I put chalk marks on each side of the door of the railroad car 145287. I got the number off the car itself and the number is the same that appears on each side of the door in Exhibit 10 which looks like my writing.

[fol. 410] (At this point, at 4:35 p.m., October 13, 1955, the jury was admonished and excused until 9:30 a.m., Monday, October 17, 1955.)

In the absence of the jury, the following proceedings were had:

The Court: I had told counsel, when we got through considering admissions in the absence of the jury, that at any time counsel for the Rock Island desired, they would be privileged to read these admissions, and just as counsel was ready to read them, counsel for the plaintiff indicated a desire to make some further record concerning the matter, and I have accordingly excused the jury, it now being 4:40 in the afternoon, to permit you to make your record.

Defendant Rock Island objects to any re-opening of the matter since the record has been made, and plaintiff having failed to object at the time the record was made, the objections now made are not timely and should not be permitted.

The Court: That was shortly over an hour ago that the record was concluded. I doubt that any prejudice could have resulted to you, and I think it is in the interest of justice that I give them this opportunity.

After discussion between Mr. Beckman, counsel for plaintiff, and the court concerning further objections to the requests for admissions, the court said:

"Well, I would be glad if you would make a note of these tomorrow and send it to me, with a copy to other counsel, so I may have it at my chambers in Des Moines where I hope to return Saturday, and I will try to give it attention there."

Mr. Howland: I want to state our position and make it clear to the court. Everyone of these requests for admissions is germane and relevant and material in my judgmen to the issue of the relationship and the liability of each [fol. 411] of the defendants to the plaintiff. The whole picture has got to be brought out in the trial of this action.

The Court: There was an obligation on the part of the person who furnished that car to furnish a car in reasonably safe condition for shipment. The car was furnished and passed through the hands of two of the defendants to its location on the side track where it was loaded and ultimately into the possession of the third defendant who carried it to its destination. Somebody owed a duty to furnish a car that would be fit to ship grain in. I can't believe that because of the controversy that may arise among defendants the court will be justified to lose sight of the rights of this person who was injured, and I am trying, so far as I can, to get through this maze of pleadings and cross claims and interrogatories and request for admissions in the too limited time that is allowed here for the court, but I am trying to get through it and find out what we may submit to this jury, find out whether the injuries that this man sustained were proximately caused by the negligence of someone, if he is free from contributory negligence, and, if by someone, who that someone is, and so instruct the jury that they make that determination. Now that in substance is what I think is my job.

Mr. Howland: I agree one hundred percent with what the court has said as to the duty of the court and as to the fact that the issues present a maze which may tend to be somewhat confusing, but manifestly the whole relationship of each of these defendants to the transaction has some measure of relevancy and bearing upon the question, and the only thing. I want to point out and make our position clear that it isn't a matter at this stage of the case to deter-

mine primary and secondary liability. It is a question of determining upon whom the duty rests, whether that duty [fol. 412] is owing at a particular time, and what the duty is under applicable rules of law. Those questions cannot be determined without a full and complete disclosure of the facts with respect to the manner in which that car was treated and handled by each and all of the defendants in this action.

The Court: I am not going to permit this jury even to speculate as to where the primary and secondary liability lies because that is a question the court will determine if judgment is entered against two or more, or even if it is against one.

Mr. Howland: With that, I am in accord with the court. With the question of primary and secondary liability, the determination of that, I am in agreement, but with respect to the production and admission of facts which have a relevancy and a bearing as to when the duty of one defendant ended and when the duty of the other defendant began, and what the status of the parties were at various stages of the proceedings, that, as I view it, is necessary to come before the jury so that the court can properly determine the questions which are to be submitted.

The Court: It is that view I took when I made the determination that I did this afternoon, and that is the reason I asked counsel for the plaintiff to furnish me, if he can by Saturday morning, those particular requests for admissions which he feels have no relevancy or materiality in this case. You may recess court until 9:30 Monday morning.

(Whereupon the court was recessed at 4:55 Thursday, October 13, 1955 until 9:00 a. m. Monday, October 17, 1955, at which time the court reconvened and the following proceedings were had in the absence of the jury.)

[fol. 413] Mr. Howland: If the court, please, in the morning mail on Saturday, I received a copy of a communication addressed to the court by Mr. Beckman, counsel for plaintiff. I want to make clear to the court the position of the defendant Rock Island with respect to the proposed

separation of this trial into various component parts as suggested by the court in the statement made after the plaintiff had rested, and at the time the defendant which I represent had started to introduce evidence on last Thursday afternoon. We object to any separation of the issues for trial, or separate trials of any particular issues as between the plaintiff and as between the defendants themselves, and for grounds state: First, that we entered upon the trial of this case without any previous order or suggestion by the court, or anyone else, that there would be any separate trials of the issues, and having taken all of the evidence of the plaintiff in chief, it takes counsel for the defendant Rock Island entirely by surprise that the issues are to be limited.

Second, that under the rules, all issues tendered by the pleadings in any case for trial are to be tried at one time, unless there has been a prior order of the court providing for separate trials.

Third, that issues of fact are tendered by the cross claims and the answers thereto which may or may not ultimately involve questions of fact to be determined by the triers of the facts, and the parties should not be deprived of a jury trial of the issues since a jury trial has been demanded by the plaintiff.

Fourth, it is factually and legally impossible to separate the issues between the plaintiff and the defendants and any of them without a consideration of the relationship of the defendants, one to the other.

For all of these reasons, we request that the court per-
[fol. 414] mit the trial of all issues which are tendered by the pleadings at one time.

The Court: You mean a jury trial of the issues as between the defendants.

Mr. Howland: Exactly, your honor. We do not concede that the case can be tried under the issues with a separation of the issues between the defendants.

Mr. Davis: I have a feeling that there should be a separation of the issues tendered under the cross claims from those to be considered by the jury. The issues tendered under the plaintiff's complaint are issues of negligence on the subject of duty and inspection of the car involved, to which the Rock Island and other defendants have filed a general denial, so that the issue for jury determination there is one of fact only as to the matter of inspection and duty with respect thereto. The issues tendered by the cross claims have nothing to do with that in my opinion. They are issues involving a legal theory of retroactive responsibility upon the Union Pacific. It is not an issue which was requested by the defendant Rock Island to be tendered to the jury, or by any of the other defendants, and it seems to be very proper and practical for the court in this case to take such further evidence as the defendants may desire to offer on the issues tendered under the plaintiff's pleadings, at that point submit those issues to the jury under proper instructions, and then in the same action, but in the absence of the jury, continue the case in trial to permit the several defendants to develop their theories on the cross claims and prospective liabilities, and then the court, as a matter of law, could consider the rights of the respective parties under this additional evidence. I have this thought, which is purely practical, and that is, if the issues which the Rock Island seeks to [fol. 415] tender under its cross petition were cited to this jury, they would become so hopelessly confused as to their significance as related to the thing which they are supposed to determine, that we would be bound to have anything but a confused verdict as a result of having submitted improper evidence to the jury.

(At this time, Mr. Anderson made a statement substantially joining in the statement of Mr. Davis.)

The Court (addressing Mr. Howland): Do you seriously contend that the request for a jury by the plaintiff to try the issues of fact involved in his case is sufficient to give you the benefit and the other defendants the benefit as to the cross claims that you have against your co-defendants?

Mr. Howland: The answer is yes.

The Court: That is all I wanted to know. You may be seated.

At this point, plaintiff objected to the reading of paragraphs 5 and 8 of the request for admissions of defendant Chicago, Rock Island & Pacific Railroad Company on the ground that the reference to C. B. & Q. Railroad Company would create confusion in the minds of the jury except as to the last sentence thereof. As to paragraphs 17, 30, 31, 32 and 33 of the request for admissions objections were made as immaterial and irrelevant.

The Court: I hold the matters referred to in No. 5 are irrelevent except the last sentence. I hold paragraphs 8 and 17 to be irrelevant, and will sustain the objections as to paragraphs 30, 31, 32 and 33. I want to make it clear that my ruling does not debar the Rock Island from raising the issues as to cross claims between defendants at the proper time.

[fol. 416] I consider this to be a controversy between plaintiff and these defendants to determine liability for the injuries plaintiff sustained by reason of the alleged negligence which resulted in the falling of the car door. It will be so very easy to becloud these issues by quarrels between the defendants that the jury will be confused completely as to the rights of plaintiff; insofar as possible, I am going to avoid it and I want to make it clear, no matter how seriously you contend, sir, I do not consider plaintiff's demand for a jury trial in this case entitles each one of these cross claimants to a jury trial; nor do I consider that all of this evidence as between cross claimants, since it is a matter to be determined by the court, should be thrown to this jury.

Mr. Howland: Under the issues between plaintiff and defendant Rock Island the question whether Rock Island owed any duty to plaintiff is presented by the pleadings and this cannot be properly shown or established except by full disclosure of the relationship of the Rock Island and plaintiff's employer. I would like to inquire whether the remarks and rulings of the court indicate that the court in-

tends to exclude any and all evidence offered by defendants with respect to the manner and method of handling orders for cars, and the situation as between defendant railroad companies themselves in respect to payment for use of the car and matters of that sort.

The Court: I do at this time as far as this jury trial is concerned.

Mr. Anderson: I think I understand the court's position there. I do not gather that the Court would exclude evidence as to the inspection that was made by the Rock Island with respect to that car.

The Court: That is a matter of plaintiff's case. We will just have to rule on these questions as they arise.

BERT NEUMANN called and sworn as a witness on behalf of defendant Rock Island, testified as follows:

[fol. 417] Direct Examination.

By Mr. Webster:

I live in Council Bluffs and am a railroad car man working on the repair track, inspecting cars and repairing bad order cars for the Rock Island Railroad. I have been a car man for the Rock Island almost thirteen years. On February 7, 1953, I made an inspection of Rock Island car 145287. I inspected it to make sure it was fit for the commodity I was going to tag it for. By tagging the car, that is looking it over to see that it is fit for grain loading, or flour, or whatever it may be—the highest commodity I can make that car. After you have inspected the car, you place a tag on the car and that tag shows that the car is for grain loading, or flour loading, or whatever the case may be.

I inspected Rock Island car 145287 for grain loading. In inspecting the car, you look it over for other defects, aside from whether or not it is able to carry grain. I looked at the trucks, and the undercarriage, and the doors and the floor—gave it a complete check. I examined the wheels and truck sides, also looked at the sill steps and handles; I inspected all safety appliances, the sills and the running board on top. The sill step is on the end of the car under the ladder that you climb to the top of the car.

It is the bottom step of the ladder, or stirrup hanging down attached to the sill of the car. There are four sill steps, one on each corner of each car. In inspecting car 145287, I looked underneath the car, also made an inspection of the door posts. At that time, the car was not loaded and the doors were open. The sill steps were not bent in any way when I inspected the car. I found the car fit for loading [fol. 418] grain. The door posts were okay. I saw no breaks. I saw nothing about the car that was defective.

Cross-Examination.

By Mr. Beckman:

My inspection of the car was made in the daytime on February 7. I do not know exactly what hour, but it was sometime in the afternoon. I think weather conditions on that date were good. The ground was probably frozen, but I don't really remember whether there was snow on the ground or not. I inspected about 12 or 15 cars that day. I do not now remember the numbers of any specific cars that I inspected. It is part of my ordinary employment and I do it repeatedly day after day. I have no particular remembrance of this particular car over any other car.

Redirect Examination.

By Mr. Webster:

I make a record of my inspection of cars. Sometime after February 10 when Mr. Williams was injured, I looked up my record on this particular car.

The Court: What do you mean by "carding the car"?

The Witness: We have different cards that say on them what you are going to have loaded in the car.

The Court: And what was on the card that you put on that car of grain, what did it say?

A. "O.K.—Grain."

Cross-Examination.

By Mr. Anderson:

When cars are sent by the Rock Island Railroad Company for loading at the Kansas Grain Company, I inspect those cars.

That is the type of inspection I referred to as having been made with regard to Rock Island car 145287.

[fol. 419] ROBERT C. DOWELL called and sworn on behalf of defendant C.R.I.&P.R.R.Co., testified as follows:

Direct Examination

By Mr. Webster:

I am employed by the C.R.I.&P.R.R. Co. as car foreman. I have supervision of the car inspectors and car repairs at the train yards and clean out track and repair track. The inspection and repair of cars at the Rock Island yards is under my supervision. I made the inspection of Rock Island car 145287 first at the Kansas Grain elevator on February 11, 1953. I made a record of my inspection at that time. I was accompanied to the Kansas Grain Company tracks by the lead carman from the repair track. I went over there about 9:00 a.m. for the purpose of inspecting this particular car. The car door had fallen off and injured a man, and I was called by the local agent because they wanted an inspection made of that car. I made a complete inspection of that car, covering all safety appliances, the undercarriage, the trucks, the couplers and all conditions which could be defective on the car.

When I arrived at the Kansas Grain elevator, one door was missing from the car and was lying there somewhere in the vicinity. I examined the sill steps of the car. Three of the sill steps were in accordance with safety appliances. One was bent inward and toward the middle of the car. That was the lefthand side of the car on the "A" end, on the north side of the car at the Kansas Grain elevator. The bent sill step that I have referred to is shown in Defendant Rock Island Exhibit 5. I have placed an arrow on the photograph pointing to the sill step which is bent. At the time I made my inspection, there were fresh marks on the sill step which looked to me had been made by a cable or some similar means. The sill step is made of metal and the marks that I referred to looked like bright marks on [fol. 420] the sill step where it otherwise would have been

dull. I examined the north door of the car. There were no defects on the door found in the inspection we made; it was off the car. The inspection of the area surrounding the car consisted of checking the door track and the top door track, your side sills and the door posts. I observed no defect in any of those structures. I looked under the car, and under that portion of the track that the car door runs on. It is called the door track. The door track is secured to the car by door track brackets, which consist of three or more supports riveted to the lower side of the door track. The brackets are secured to the side sill. The side sill goes the length of the car, on this particular car, the side sill does not go the whole length of it, but there is a steel angle beam which is above it which goes the length of the car. The side sill is supported by needle beams, as they are referred to, or cross ties, or cross members. The side sill is one of the supporting members of the car itself. In the general construction of the car, the door posts are put there for holding the car in from the sides. The door posts do not give any support to the side sills which I have referred to or hold it up in any way.

Plaintiff's Exhibit L-1 shows the bracket which supports the door track or runner. It shows an arrow pointing to it there. The side sill is also observed in the picture. The side sill is shown by the Letter "B" which someone has placed in the picture with a pen. The letter "T" shows the door track. Exhibit J-1 is a photograph of a part of [fol. 421] a box car. There is a strip of steel which runs up and down the outside of the lefthand corner of the door and that is weather stripping, or door spark, which gives no support to the door track, and does not hold it up in any way. If there were a crack between the door runner and that weather stripping, such a crack would have no effect on the structual strength of the car whatever. It would have no effect on the operation of the door. It would not affect the door track in respect to whether it was higher or lower than its normal position.

Defendant Rock Island Exhibit 9 shows a box car door. I have no way of knowing that that is the particular door that was involved but it is the same kind of a door for that series of car. I can't tell by the background in the

picture whether it was taken down at the Rock Island repair track or the train yard. The only thing I can go by is the landmarks in the background of the picture and this pole there with the switch on it.

Q. Now, Mr. Dowell, I call your attention to Rock Island Exhibit No. 10 and ask you if that appears to be a photograph of Rock Island car 145287 which you inspected as you have told us here today.

Mr. Beckman: I object to this leading and suggestive manner of identifying the photograph.

The Court: I think you may tell if he does know what it portrays.

A. This picture shows a car with a door off—it is missing.

Q. Does that appear to be the car which you inspected on February 11?

A. Well, it could be. It is the same series although there are no markings on the car shown in the picture; it is the same series.

[fol. 422] I did not inspect ny other cars on that day with the door off.

Mr. Webster: In connection with the examination of this witness and the witness, Fred Neubaum, the defendant Rock Island offers into evidence Exhibits 9 and 10.

Mr. Beckman: Plaintiff objects for the reason that there is no proper foundation by either of these witnesses.

The Court: I do not know that the testimony of this witness adds anything to the identity of these two exhibits. Exhibit 9 will be excluded. I sustain the objection to it. Exhibit 10 I will admit for what ever help it will be to the jury.

In my inspection of this car on February 11, I observed nothing defective about the door track on the north side. I looked at it and inspected the angle iron at the top of the door and there was no defect in it. The angle iron was

bent in no way up there. There was nothing disclosed by my inspection of February 11 which would cause the north door on car R.I. 145287 to fall off without the exertion of some external force against it.

Cross Examination

By Mr. Beckman:

I saw the condition shown in plaintiff's exhibit J-1 at the lower left corner of the door opening. Most of the cars are not all welded together; there is a space between them at the lower door track and the door stop. I don't know if in the general construction of these cars then they were welding them or not, but when cars move from repair track to repair track different odd jobs are done on the cars, but I do not believe that that was to be secured to that spark screw in the general construction of the car. There [fol. 423] may have been somebody that might have welded that at sometime or the other that caused your jagged edges there; it is not welded there as shown in the picture. It isn't a very clear photograph there on Exhibit J-1; it looks like there is some snow or something back in there too. The condition of the door track shown in Exhibit J-1 appears to be in natural condition to me; the door track itself is intact.

On Exhibit L-1, that is your weather stripping, or your door spark, that is shown beneath the lower door track as displayed in that photograph. There is an arrow pointing here to a dark spot right behind the door track bracket, and that is your back angle or weather stripping, or your door spark as we call it, which extends through your door track for the back of your door to catch when it closes. That is weather stripping and not an extension of the door post shown in Plaintiff's Exhibit "C". That goes through the door track. I didn't observe that break on the morning of February 11, 1953; we were up and down on that car from one end to the other, myself and my lead car man that morning, and of course, something like that could have been overlooked, for that don't have any bearing on the actual construction of your door track. I don't believe

anything was overlooked in that inspection. If it had existed when we looked at the car, it could have been overlooked. If that condition existed, I made no mention of it and overlooked it. This stirrup or step about which I testified has no connection to the door, or door track mechanism.

J. A. CHRISTIANSEN, called and sworn on behalf of defendant, C.R.I.&P.R.R. Co., being first duly sworn, testified as follows:

[fol. 424] Direct Examination

By Mr. Howland:

I am General Freight Agent for the Chicago, Rock Island and Pacific Railroad Company. My particular work has to do with rate matters, the presentation and preparation of cases before the Interstate Commerce Commission and dealing with tariff interpretations and rates. In a general way, I am familiar with the practices, customs and usages of railroad companies in the central western part of the United States with respect to the movement of cars at terminal points which are billed on one line of railroad, which does not reach a particualr industry where the car may have originated or may be destined. In Omaha, Nebraska, and Council Bluffs, Iowa, there is what is known as a Reciprocal Switching District among the railroads. The Union Pacific Railroad is one of the railroads which operates in and serves the Omaha, Nebraska-Council Bluffs, Iowa, area.

Q. Now, will you tell us in plain language and without he use of technical terms what you mean by a Reciprocal Switching District?

Mr. Anderson: Defendant Union Pacific Railroad Company objects to the question as irrelevant between plaintiff and defendants, and as immaterial to any issue which might be raised in this case. There is no sufficient foundtion laid, no showing whatsoever that the question has any relation to the defendant Union Pacific Railroad Company, and this witness is wholly incompetent to so testify.

The Court: Insofar as the matters sought to be inquired about have to do with any so-called cross claims that may exist among the several defendants, I will exclude the testimony at this time and sustain the objection.

Mr. Howland: This evidence is offered by defendant [fol. 425] Rock Island for its relevancy and materiality and competency with respect to the relationship between the defendant Rock Island and the employer of the plaintiff, the Kansas Grain Company.

It is not my understanding that there has been any objection made by counsel for the plaintiff to examination of this witness. I do not believe it lies in the mouth of the Union Pacific to make an objection on the basis that has been set forth.

Mr. Anderson: We also object on the ground that this evidence is irrelevant to any issue that will be submitted to the jury, and further, that it will only tend to confuse the issues, and I think we have the right to make that objection whether plaintiff himself objects or not.

(At this point, the jury was excused from the court room and the following proceedings were had in the absence of the jury:)

Mr. Howland: the object and purpose of presenting this witness is first, to develop the factual relationship which exists when a shipment is made from an industry located on the line of one railroad, over another line of railroad, which is within the reciprocal switching district established pursuant to tariff provisions. We desire to prove by this witness that it is generally customary, and particularly at the Council Bluffs, Iowa-Omaha, Nebraska terminal that shipments are made both inbound and outbound over any line of railroad destined to any industry on the line of any other railroad, and that the line of railroad which secures the billing, or the road-haul, or line-haul carrier, as it is called, pays a switching charge which is absorbed by the [fol. 426] line-haul carrier subject to certain minimum charges. In addition to this particular evidence, we expect to have the witness identify the tariff provisions in the tariffs of the Chicago, Rock Island and Pacific Rail-

road Company which provide for the amount of the switching charge made by the Rock Island between industries on its line of railroad at Council Bluffs, Iowa and junctions with connecting lines.

We expect also to have this witness identify the tariffs of the defendant Union Pacific Railroad Company and show that thereby Union Pacific Railroad Company pays, or absorbs, the switching charge on outbound shipments, when it receives the billing from the originating industry.

We desire to further show that the service performed by the switching carrier is performed for the account of the line-haul carrier, and under such circumstances the switching carrier acts only as an agency of the road-haul, or line-haul carrier, to reach the industry, or a connecting line between the point of origin of the car and the railroad which has received the billing and is the line-haul carrier.

The Court: I think in the circumstances I would be glad to hear from the plaintiff as to whether he has any objection to this line of questioning.

Mr. Beckman: This is the same thing that paragraphs 30, 31, 32 and 33 of the admissions of facts stated, and we have the same objection to this testimony as we would have to the reading of those paragraphs.

The Court: I am going to give you an opportunity here on my own motion to make an offer of proof by this witness in the absence of the jury and I will tell you whether or not I am going to allow you to prove what you propose.

(Defendant Union Pacific Railroad's Exhibits 1 and 1A [fol. 427] were marked for identification.)

It was conceded on the part of all parties that Union Pacific Exhibit 1 is the original of a bill of lading covering movement of Rock Island car 145287, one car of bulk corn, from Kansas Grain Company, Council Bluffs, Iowa, to order of Kansas Grain Company, Denver, Colorado, notify Houlton Grain Company, Denver, Colorado, dated February 11, 1953, and that Union Pacific Exhibit 1A is a photo-

static copy of Union Pacific Exhibit 1 which may be substituted in the record and used in lieu of Exhibit 1 in the further examination of this witness and other witnesses.

(Defendant Chicago, Rock Island & Pacific Railroad Company offers and introduces in evidence Union Pacific Exhibit 1-A and same was received in evidence without objection.)

Note:

Page 311 (2 sides) is at top left of Card 6. Page 312 is blank.

[fol. 429] Mr. Beckman: Let the record show that so far as these rates, rules, regulations and contractual arrangements and the relationship between these defendants are concerned, we object to them as being irrelevant, immaterial to any part of plaintiff's case against these defendant railroads.

The Court: As between this plaintiff and you and the other defendants, these are matters that I am not going to admit into evidence. You are at perfect liberty to make your offer, identifying them in such way as will permit you to make your record on appeal if you have an adverse result.

Mr. Howland: At this time, defendant Chicago, Rock Island and Pacific Railroad Company offers to show by this witness that by the term "reciprocal switching service" is meant that service which one railroad company performs for another, within a switching district or other defined area, in connection with which service the switching [fol. 430] carrier does not receive any part of the line-haul or road-haul charge of a particular shipment or a particular car. That the effect of reciprocal switching within a district is to extend the rails of the road-haul, or line-haul carrier in effect to all industries located on other lines of railroad within the prescribed area. That, as applied to a situation such as here involved, where the bill was made as shown by U.P. Railroad Exhibit 1 over the line of the Union Pacific Railroad, the defendant Rock Island Railroad merely performed a service in switching or shunting the car from the Kansas Grain elevator to a connecting track of the Union Pacific Railroad Company connected with the tracks of the Rock Island.

We desire further to show that reciprocal switching charges are generally paid by the line-haul or road-haul carrier out of its revenues, subject to certain minimum charges. The reciprocal switching rate published in the tariffs is made on a flat charge per car, without regard to the type or character of the commodity being shipped or handled, and such rates, both at the Omaha, Nebraska-Council Bluffs, Iowa, terminal and elsewhere are generally figured on an exceedingly low rate without reference to the

general level of rates for transportation of commodities between a point of origin and a point of destination.

We desire to have the witness identify Rock Island Freight Tariff No. 21432W which shows switching and other terminal charges of the Rock Island at Council Bluffs, Iowa, and the rate between industries located on the line of the Rock Island and junctions with connecting lines on car load business handled by the Union Pacific Railroad Company in road-haul or line-haul service.

We desire the witness to identify also Supplement No. 140 to freight tariff No. 21432W which lists Kansas Grain [fol. 431] Company as an industry of the Rock Island Railroad at Council Bluffs, Iowa, and prescribes the rates for performing switching service between said industry and a junction with the Union Pacific Railroad Company.

We desire also, when that identification has been made, to have the following portions of the tariff charges incorporated into the record by a reference to the freight tariffs above referred to.

Further, we desire to have this witness identify, and to offer in evidence the tariff provision appearing at page 14 of Supplement No. 140 to Chicago, Rock Island and Pacific freight tariff No. 21432W, showing basic rates for reciprocal switching service to or from Kansas Grain Company at Council Bluffs, Iowa, to be $2.48, which has been increased by other supplements to a total charge effective February 10 and February 11, 1953, to the amount of $4.86.

We further desire to have this witness identify Union Pacific Railroad Company tariff 105M and refer to Item 615 of said tariff wherein Union Pacific Railroad Company provides that "connecting lines' switching charges as per current tariffs lawfully on file with the Interstate Com- [fol. 432] merce Commission on Interstate traffic, or the respective State Commissions on Intrastate traffic, will be absorbed by the Union Pacific on carload shipments, subject to minimum charges as provided in Paragraphs (a) and (b)."

Mr. Beckman: The plaintiff objects to the proffer for the reason it is based on evidence that is entirely irrelevant and immaterial to plaintiff's claim against the defendant Rock Island or any of the other defendants in this case; that the proffer is not proper in form and is so extensive and detailed that proper specific objection cannot be made to any particular part thereof.

The Court: Your objection will be sustained. But that will not deprive the Rock Island at an appropriate time, if and when an adverse ruling may have occurred, to raise the questions as between itself and its co-defendants.

Mr. Howland: We have another witness whose evidence will be along the line of explaining and identifying what is known as the "Per Diem Car Rules of the Railroad Companies," and particularly those which obtained in February, 1953 and at the time of the plaintiff's injuries at the Omaha, Nebraska-Council Bluffs terminal area. Those are included in certain items, the authenticity of which has been admitted, by the defendants herein. The witness, Elmer E. Smith, is local freight agent for defendant Rock Island in both Omaha and Council Bluffs.

The Court: Very well. The defendant says that if he were called and sworn as a witness you would offer to prove by him, what?

Mr. Anderson: I would like the record to show that Union Pacific Railroad's objections to the particular offer of proof which was just made by counsel for the Rock Island with relation to the witness Christiansen are based on the grounds that it calls for conclusion of the witness; [fol. 433] second on the ground that it assumes a basis for calling for such conclusions, facts which are not presented either in evidence or in the offer of proof; calling for conclusions of the witness on matters that are not properly the subject of opinion evidence, and for the further reason, in addition to those given at this time and previously given, that the offer of proof is completely beyond the scope of any specific question submitted to the witness.

The Court: I will treat that as having been interposed before my ruling, and my ruling stands the same.

(At this point, the members of the jury were called into the court room at 11:45 a. m., October 17, 1955, admonished by the court and excused until 2:00 o'clock p. m., October 17, 1955.)

Mr. Howland: In connection with the proffer of the testimony of the witness ELMER E. SMITH, defendant Rock Island at this offers to prove by said witness that in his capacity as local freight agent for this defendant at both Omaha, Nebraska and Council Bluffs, Iowa, he is familiar with and will identify Exhibit 15 as the Code of Per Diem Rules prescribed by the Association of American Railroads for all signatory or subscribing railroad companies; that the particular portion thereof which the witness will identify pertains to the following rules set forth on pages 6, 7, 8, 14, 15 of this exhibit, Rock Island No. 15, Rule No. 1 provides in substance as follows:

"The rate for the use of freight cars shall be $2.00 per car per day, which shall be paid for every calendar day, and shall be known as the Per Diem Rate."

That Rule 2 prescribes the method for computing the number of days that a car is held by one railroad, and [fol. 434] prescribes that "days shall be reckoned by subtracting the date of receipt from the date of delivery." "A road receiving and delivering a car on the same date shall not pay a per diem."

Rule 3 which prescribes "that freight cars must be handled as prescribed by rules 1 to 6, inclusive, of the code of car . . ."

The pertinent rules being heretofore stated, plus Rule 4 in its entirety, paragraph (a) of Rule 5, and the interpretation of Rule 5 appearing on page 8 in conjunction with the matters set forth. We also refer to page 14 wherein the application of per diem rules to cars delivered to industries and taken out and/or forwarded by other than the delivering road are set forth, being the paragraphs appearing under the heading "Interchange Via Industries Not Performing Their Own Switching." On Page 15 we desire to have

identified the definitions of "a terminal switching road," the definition of "a carrier road," which are the status of the defendant Rock Island and U. P. respectively; the definition of "terminal switching service," the definition of "interterminal switching service," the rules appearing on page 15 designated as 1, 2, 3 and 4; and we desire also to have identified by the witness exhibit 16, which is the Code of Reclaim Rules of the Council Bluffs-Omaha-South Omaha Per Diem and Reclaim Association, of which all defendants are subscribers or members, and the witness will identify exhibit 16 as effective and governing the subjects therein set forth.

And we desire particularly to have identified and offer page 8 wherein the definition of a terminal switching road is set forth; page 9 under the designation "Carrier Road" wherein the designation and definition of a "Carrier Rail-
[fol. 435] road" is set forth; and page 10 of Exhibit R. I. 16, the definition of "terminal switching service," and page 12 wherein Rule 1 is set forth. Section 1, prescribing that "the carrier road will allow the terminal switching road the established per diem reclaim arbitrary charge," and offer to prove by the witness that the per diem reclaim arbitrary charge was three point eighteen days for cars moving from industries such as Kansas Grain Company on the Rock Island where Union Pacific Railroad received the line-haul movement on the shipment. In other words, we desire to prove that under operation of the reclaim rules set forth in defendant Rock Island's exhibit 16, in the usual and normal course of handling the Rock Island would have reclaimed a per diem amounting to slightly more than $6.36, covering the use of Rock Island car 145287 while the same was legally and constructively in the possession of the U. P. while being loaded and switched on the rails of the Rock Island as a terminal switching carrier as defined in exhibit Rock Island 16.

I desire to add further that the use of the arbitrary charge allowed by agreement between the railroads of a per diem allowance of $2.00 per day for three point eighteen hundredth's days' time to the Rock Island by the U. P. constitutes a payment to the Rock Island by the U. P. for the use of the Rock Island car antedating the time that loading

was started by the Kansas Grain Company under the normal circumstances of the case of such movement. In other words, the offer of proof is that by operation of the local reclaim rules the U. P. Railroad Company would normally pay to the defendant Rock Island the per diem reclaim at all times while Rock Island car 145287 was in the possession of Kansas Grain Company.

Mr. Beckman: To all of which the plaintiff objects on the basis of it being immaterial and irrelevant to the claim plaintiff is making against any of defendant railroads.

[fol. 436] Mr. Anderson: We make the same objection that I have made to the witness Christiansen's offer of proof.

Mr. Davis: We join in the objections of plaintiff and Union Pacific.

The Court: I will sustain the objections.

(Whereupon, the court recessed at 12:15 p. m. until 2:00 o'clock of the same date.)

Dr. Lee R. Martin, called and sworn on behalf of defendant C.R.I.&P.R.R.Co., testified as follows:

Direct Examination.

By Mr. Howland:

I am a licensed physician and surgeon; a graduate of Creighton University at Omaha, and have been engaged in the practice of medicine and surgery since 1937. I have been located in Council Bluffs since 1938 with the exception of war-time service. I specialize in orthopedic surgery, which constitutes the treatment of conditions relative to the supporting structures of the body, bones, muscles and similar supporting structures. All bones are considered supporting structures. I am a member of the Pottawattamie [fol. 437] County Medical Society, Iowa State Medical Society, The Iowa Orthopedic Society, The American Association of Railroad Surgeons, and The American Association of Occupational Medicine and Surgery. For approx-

imately three years I have been and still am surgeon for the Chicago, Rock Island and Pacific Railroad Company at Council Bluffs. In addition, I act in a similar capacity for the Chicago, Northwestern and the Burlington. I am not a Division Surgeon for any of these railroads but render such service as I may be called upon to perform.

I examined William E. Williams, plaintiff in this case, at my office on October 4, 1955. I gave him a general physical examination at that time including x-ray examinations, and laboratory examinations, or tests. Under my direction, Mr. Williams was given a complete blood count including red cell count, white cell count and hemoglobin. Also a blood sedimentation test, and a Wasserman test, a complete urinalysis was done including specific gravity, acid reaction, albumen test, sugar and microscopic examination. The white cell count showed a rate of 14,000. The normal white cell count of a man approximately 60 years of age in normal health is 7 to 9,000. A white cell count of 14,000 would ordinarily indicate the presence of an acute inflammatory, or an acute infectious process of some kind. You would have to look further in order to find where the acute infectious process was. The count of 14,000 white cells means 14,000 cells per centimeter on the counting chamber. The red cell count was 4,400,000 which is within normal limits.

In the sedimentation blood test, blood is drawn into a syringe; a measured amount is citrated, mixed with a solution to keep it from clotting too rapidly, and placed in a [fol. 438] tube, and the rapidity with which the cells drop out of the solution determines whether or not the infectious process or inflammatory process, is present in the blood stream and in the system. The normal reading is ordinarily from zero to fifteen millimeters drop in one hour. In the case of Mr. Williams, the sedimentation rate was 45 millimeters in one hour. That would indicate that there was either an acute inflammatory condition, or infectious process of some degree, present in his system, probably within the moderate range.

There was an urinalysis made in Mr. Williams' case and the microscopic test showed a reading of from 30 to 35 pus cells per high powered field. When you have a

finding of 30 to 35 pus cells per high-powered field under your microscope that signifies to the physician some type of infectious process along the urinary tract of the patient. The infectious process may be in the kidneys, in the bladder or it could be in different ducts leading into the urethra.

I made this examination of Mr. Williams at the request of the defendants in this action. He was not a patient of mine and I have not had him under treatment. I was not treating him as his physician at that time, and I made no further or additional tests to determine the location in the system of Mr. Williams of the condition which was producing the pus cells in the specimen.

I took the blood pressure of Mr. Williams on October 4 when I examined him. The systolic pressure was 172; the diastolic pressure was 92. The normal blood pressure of an individual approximately 60 years of age in a normal state of health might vary from 110 to 150. A systolic pressure of 172 would indicate some abnormality, or something above normal limits. During the course of the gen- [fol. 439] eral examination and the use of the x-ray, it was found that Mr. Williams had considerable arteriosclerosis which could go along with the elevated blood pressure. The infectious process in the urinary tract could or could not be a factor that would influence the blood pressure reading of the patient.

Xrays were taken of Mr. Williams' dorsal spine, the lumbar spine, and the lower right leg. The x-ray films revealed evidence of an old well-healed fracture of the distal end of the fibula, and at about the junction of the medial and distal third of the shaft of the tibia. The tibia is the large bone of the lower leg that extends from the knee down to the ankle joint. There was nothing apparent from the x-ray films of the leg that would indicate any disability of the limb or affect Mr. Williams' ability to work or perform labor.

The spinal column is made up of the vertebrae of the neck, below that the dorsal, or thoracic vertebrae, extending from the junction of the neck to approximately the waistline. There are twelve dorsal vertebrae. The next

group is the lumbar group which extend from approximately the waistline to the pelvic bone or sacrum—five in number. The x-ray examination revealed an old healed compression fracture of the 11th dorsal vertebrae. There is no evidence of any trauma in the lumbar vertebrae. There was evidence of arthritic changes shown by x-rays of the lumbar spine taken at the time of his injury. In my examination, I subjected Mr. Williams to bending and stretching movement tests. He was taken through the normal range of motions of the back. There was normal range of motion throughout. There was a slight amount of limitation of motion on forward bending, or flexion. Mr. Williams was able to bring his fingertips to within eight inches of the floor. There was a small area of the back of localized tenderness which appeared to be in the soft tissues [fol. 440] rather than in the bony structures. By soft tissues, I refer to the muscles or ligaments as contrasted to the bones.

I have examined the hospital records of Mr. Williams covering the period that he was in the Jennie Edmundson Memorial Hospital in Council Bluffs. The hospital records do not indicate the presence of any urinary tract infection while he was in the hospital. The hospital records showed urinalysis tests and those were recorded on the hospital records. In my opinion, there would be no connection between the injury sustained on or about February 10, 1953 and the urinary tract infection which I found on October 4, 1955. I have examined the x-rays taken of Mr. Williams at the Jennie Edmundson Memorial Hospital on February 10, 1953. By referring to plaintiff's Exhibits O-1 and O-3, I find evidence on those x-ray exhibits of arthritis, or arthritic deposits in the spine of Mr. Williams. On the anterior-posterior views of the lumbar spine, there appears to be about the same amount of arthritic deposit present in October, 1955, as was present in February, 1953. That was true also of the dorsal vertebrae. With regard to the lumbar vertebrae on the lateral view, there appears to be a little increase in the amount of arthritic involvement in the last x-rays.

Defendant Rock Island Exhibit 17 was taken under my direction and supervision on October 4, 1955 and is a correct photographic representation of the lateral view of the dorsal spine of Mr. Williams.

(Defendant Rock Island Exhibit No. 17 offered and received in evidence without objection.)

In persons approaching the age of 60, when arthritis is present, there is ordinarily a tendency for it to be progressive.

[fol. 441] The presence of a urinary tract infection could be a factor in causing Mr. Williams to tire easily on making certain efforts. The presence of the arthritic condition in Mr. Williams' back would be a factor in his ability to perform work, and also would be a factor in his tiring while performing work. That is true because, with the amount of arthritic changes evident on the x-ray films one would expect that an individual would have a certain amount of backaches, and the back would tire more easily and be subject to recurrent flare-up from time to time, depending on the general condition of the patient, trauma and aggravating factors. By the term "trauma" I include lifting or other activities incident to heavy work. The urinary tract infection which I found in Mr. Williams' case could be an aggravating factor in the arthritis. I feel that treatment of plaintiff's arthritis would improve his general condition. The arthritis condition was present prior to the time of the injury which Mr. Williams sustained. With respect to the urinary condition, there was no evidence of it noted on examining the records of the hospital. In my judgment, neither of these conditions would be brought about by the injury of February 10, 1953.

Cross-Examination.

By Mr Beckman:

The Wassermann test given October 4 was entirely negative. The only examination I ever made of plaintiff was on October 4, 1955. I did not examine him before, or since. The hospital records do not indicate that there was any urinary tract infection existing at the time plaintiff was in

the hospital. The condition evident on my examination of October 4 is one that could change substantially in a relatively short period; one examination is no indication of a permanent condition with respect to a urinary tract infection. The fact that plaintiff may have had to take a high [fol. 442] amount of calcium would not, to the best of my knowledge, have anything to do in causing the infection in the urinary tract. Such treatment should improve the arthritic condition. If medicines of that character were taken over a period of five or six months, I don't think it would affect the urinary tract of the individual from the standpoint of pus formation.

I testified that the x-rays showed an old compression fracture of the eleventh dorsal vertebra. The dorsal vertebrae normally have ribs extending from them while the lumbar vertebrae do not. In plaintiff's Exhibit "O-2", there appears to be a compression fracture of the vertebrae marked "10" on the film. An examination of the film indicates that the 10th dorsal vertebra has a compression fracture. From this x-ray, it would be necessary to have other views in order to check back to determine whether it was the tenth or eleventh dorsal vertebrae that was the one affected. You cannot tell by examining plaintiff's Exhibits "O-1, "O-3" or "O-2" whether the [vertabrae] affected is dorsal or eleven. On Exhibit "O-2" the lowest dorsal [vertabrae] appears to be the one marked "12". Assuming that is the twelfth dorsal it is apparent that the tenth has been crushed. "D-12" has the appearance of being either the lowest dorsal [vertabrae], or a lumbar with a supernumerary rib. Assuming that there are five lumbar [vertabrae], then the crushed or jagged [vertabrae] would be dorsal "10"; if there is a still lower lumbar [vertabrae] [fol. 443] then it would be dorsal "9". Looking at plaintiff's Exhibit O-2, the second lumbar vertebrae appears to be slightly lower on the anterior distance than on the posterior. The same condition exists with respect to the fourth lumbar [vertabra]; it is narrowed near the front of the vertebrae. Plaintiff's Exhibit O-22 indicates that the intervertebral disc between the tenth and eleventh dorsal vertebrae is almost entirely gone. I couldn't state definitely whether the disc is gone—only with respect to the

space ordinarily occupied by the disc. I would say that it would be correct that the density of the arthritic deposit is greater on plaintiff's Exhibit O-22 than on plaintiff's exhibit O-2. There is deformity in the fourth lumbar vertebrae shown in plaintiff's Exhibit O-22, the narrowing that appeared in O-2 still appears in O-22. I looked at the hospital records marked Plaintiff's Exhibit "M" and "N" [fol. 444] prior to testifying here, at parts of them.

2. Did you notice what drugs were given the plaintiff for pain relief?

Mr. Howland: Objected to as not germane to the direct examination, and therefore not proper cross-examination.

The Court: In view of the testimony that they had as to the type of infection he may have had, I think he may inquire about the use of drugs.

Q. Showing you Page 29 of the exhibit marked "Plaintiff's Exhibit "M", will you tell the court and jury what it appears plaintiff was given for relief of pain during the first 24 hours in the hospital.

Mr. Howland: Same objections are renewed.

The Court: Overruled.

A. Specifically for pain, morphine was the only drug given.

Q. How much morphine was given to him each time.

Same objection and ruling.

A. He was given doses in the amount of one-fourth grain each time.

Q. How frequently was that given to him the first 24 hours?

Same objections and ruling.

A. He was given one injection at 5:20 p. m., the next injection at 7:10 in the morning, the next at 12:00 noon; the next at 12 midnight and approximately at 4:15 in the morning; the next one being given at approximately 1 or 2 o'clock the next day.

Q. What does that indicate as to whether or not Mr. Williams was undergoing severe pain?

Same objection and ruling.

A. It would indicate that he had pain.

[fol. 445] Q. Isn't that a fact, doctor, that was a heavier does of morphine that was being given than is normally given to a patient before he goes into surgery.

Same objections and ruling.

A. The dosage before surgery varies from a sixth to one-fourth grain.

Q. He was given the maximum dosage of morphine, isn't that right, doctor?

Same objections and ruling.

A. Not the maximum dosage, but the average dosage.

Q. Doctor, from your experience in the field of orthopedic surgery, this type of injury is an extremely painful type of injury, is it not?

A. With regard to average or with regard to just pain?

Q. With regard to pain, doctor, isn't it the same?

A. Yes.

No physican or surgeon today knows exactly the cause of hypertrophic arthritis; traumatic arthritis could be present in the dorsal area of Mr. Williams' spine where the bones are fused together. The x-ray film shows the hypertrophic arthritis is obvious in that area and traumatic arthritis could be in that area based upon the type of injury. It is true that an injury always aggravates an arthritic condition at the point of injury. It is true that a man who has been doing heavy manual work could be suffering arthritis without suffering much pain. A man who has been doing heavy manual work with arthritis, in general, would not probably experience as much pain from normal exertion as a man who has been totally disabled for a period of 18 months.

[fol. 446] I found no evidence to indicate that Mr. Williams has a venereal disease of any type. His infection could be from many causes. I did not follow up to see what was causing it. The condition could have existed the day I examined him and be gone the next day. In my opinion, the urinary tract infection could not have been caused from trauma. It is true that blood pressure varies from day to day. It is true that it is impossible for one in the medical profession to be absolutely positive with respect to the arthritic conditions and the urinary tract infection. If you observe this man on just one occasion, you might reach one conclusion, but if you examine him over a period of time, you might have a different conclusion.

Redirect Examination

By Mr. Howland:

In order to determine definitely what was causing this urinary tract condition, further tests and examination would be required.

Charles G. Poetzel called and sworn as a witness on behalf of defendant, Chicago, Rock Island & Pacific Railroad Company, testified as follows:

Direct Examination

By Mr. Webster:

I am Assistant Car Foreman for the Northwestern Railroad in Council Bluffs, Iowa. My duties are to supervise the inspection and repairs of freight and passenger cars. I made an inspection of a Rock Island car at the Kansas Grain Company elevator on February 11, 1953 at 31st Street and 1st Avenue. I inspected Rock Island car 145287, a box car loaded with grain. At the time I inspected it, one door was off the car. My inspection consisted of an examination of the general physical condition of the car including the couplers, the hand brakes, the doors, the door [fol. 447] openings and the door track. In my inspection, as near as I could determine, the bottom door track and the

top door track were both straight. I did not make an inspection of the door itself which was off the car. In my inspection, I did not look underneath the door track and underneath the car; I did not observe any breaks in the door posts of that car. I saw no breaks or dents in the angle iron which holds the door in place. On this car, I don't think the door post in any way supports or holds up the door track. I think the door post is behind the door track; the door track is supported by brackets that are riveted on to the side sill, and the door track rests on top of that.

Q. Mr. Poetzel, from your inspection of Rock Island car 145287 did you find anything aside from the application of external force which could cause this car door to fall off?

Mr. Peterson: That is objected to as calling for a conclusion of—opinion and conclusion of the witness. Witness is incompetent. Immaterial and irrelevant.

Mr. Beckman: The question is leading and suggestive.

The Court: Well, it is only an expression of his opinion. While he hasn't laid very much of a basis for it, I am going to let him answer it for what it will be worth to the jury.

A. No, I did not.

I have been with the Northwestern Railroad about forty years and have been Assistant Car Foreman a little less than thirty-five years. I have had occasion to inspect quite a number of box cars in that time.

Cross Examination

By Mr. Beckman:

I received a telephone call on the morning of February 11, 1953 to go down and make an inspection of this car on [fol. 448] the River Track. I remember the incident of making the inspection. A man by the name of Ted Peterson, another employee of the Northwestern Railway, went

with me. He is a car repairer. This inspection was made sometime in the morning; I don't remember the exact time. It was a cold day and light snow had fallen; there was some snow on the ground. I did not look under the lower door track. In making my inspection, I observed the lower left corner of the door opening. I evidently saw the condition which is shown by the Exhibit J-1; I don't recall exactly the condition. I don't recall the condition at the point where the arrow points toward the lefthand door post on Exhibit J-1. I did not look at it closely at that time; I did not look at the door at all; I did not look underneath the lower door track. I don't know anything about the conditions existing under the door track. The righthand door post is riveted to the side sill underneath the door track. That is based on my general knowledge of this type of car.

Redirect Examination

By Mr. Webster:

Q. Referring to the photograph, Exhibit J-1, and calling your attention to this arrow pointing to the spark strip that appears in the picture, would any crack or gap between that strip and this door rail have any effect on the structure or position of the door track?

[fol. 449] A. No, sir.

Carl A. Stump recalled and sworn as a witness for Chicago, Rock Island & Pacific Railroad Company, testified as follows:

I am superintendent of the Kansas Grain Company elevator and was on the witness stand sometime last week as at witness for plaintiff. In the operation of the Kansas Grain elevator, we have occasion to do business with various railroad companies in the Council Bluffs and Omaha area including the Rock Island, C & N.W., C.B. & Q., Missouri Pacific, the U.P. and the C.G.W. It would be correct to say that we are either shipping in or shipping out from the elevator various types and kinds of grain over every

railroad that comes into Council Bluffs. That is true to a great extent.

I don't place orders for cars for grain loading with the railroad companies serving the Council Bluffs' elevator. That is done by the Omaha office. One of the problems that we have in running an elevator is to take care of the needs for outbound shipments and have cars on hand. We have to anticipate that each day. Orders for cars are placed to the various railroads by our Traffic Department. Empty cars set at the elevator are normally placed west of the loading shed. In placing those cars, no distinction is made with respect to the railroad that may have furnished the car or made it available for loading. We get our directions with respect to the number, quantity and size of cars to be loaded from the main office of the company in [fol. 450] the Grain Exchange Building in Omaha. At the time this accident occured, we did not get written orders from the Omaha office. As a general rule, it was just a phone conversation between the manager, or grain buyer of the Omaha office, and the superintendent at the elevator. Those calls could be handled by me or one of the clerks at the elevator. In those calls, with respect to the cars to be loaded, I was in no way given any instructions with respect to the destinations of the cars at that time. I was told the type, quality and quantity of the grain to be loaded.

Q. So then having received directions, we will say to load two thousand bushels of No. 2 yellow corn, what would be the next step in accomplishing those directions?

A. Well, those cars would have to be inspected by the Western Weighing and Inspection Bureau.

Q. What is the Western Weighing and Inspection Bureau?

A. Well, I couldn't specifically explain it. As I understand it, it is a part of all the railroads.

Q. And does the Western Weighing and Inspection Bureau maintain an individual employee on the River Track?

A. They have one; they call it foreman or leadman, and they have several others that work under him. Maybe they will be here today and gone tomorrow and somebody else will be here. This foreman or leadman works on the River Track.

[fol. 451] There are two elevators on the River Track besides the one referred to as the Kansas Grain elevator. The foreman or leadman for the Western Weighing and Inspection Bureau looks over the box car on the inside when empty cars to be loaded are sent in, and they cooper the car with either wood or paper grain doors. Some companies under shipment prefer paper grain doors. They have both types available there. The grain doors are put in the cars by the Western Weighing employees. The grain doors consist of either wood or paper fastened to the doors for the purpose of containing the contents of the car itself. Exhibit C is a photograph of a box car showing a paper grain door in place. It is called a signal grain door, I believe. When the grain door has been placed in the car, as a rule, if the cars in line fit the order, they would be moved for loading directly as they come in, one after another down the line from the west to the east.

The normal practice would be to load the order cars back to the road that they were ordered off of. We did not always follow that practice. Now we will say that we had ten cars ordered off the Rock Island road. I had ordered these ten cars Monday for Wednesday morning loading. if those ten cars did not show up from the Rock Island, and may be I had ten cars ordered from the Milwaukee and the Rock Island order had to go out first, so we load the Milwaukee cars and send them Rock Island, and replace the Milwaukee with the cars that came up from the Rock Island. That was a part of our usual custom of operating that elevator.

In February of 1953, my office had nothing to do with billing the cars out on various railroads. After the car had been loaded and the official grade had been received from [fol. 452] the Omaha Grain Exchange, the traffic depart-

ment would then call me and give me what we call the tagging of the car, and we would in turn telephone this to the car checker at 32nd and First Avenue, and tell him whether the car went C. B. & Q., R. I., U. P. or what way it would go. Bills of lading were made out in the Omaha office entirely in 1953. It was not customary in February, 1953, to follow that telephone report to the checker with a written order or confirmation.

(Defendant R. I. Exhibit 18 marked for identification.)

Defendant Rock Island Exhibit 18 is what we call a tagging sheet which is given the following day after the conversation with the checker. The paper marked "Defendant R. I. Exhibit 18" is a form which was in use by the Kansas Grain elevator in the month of February, 1953. There were three copies usually made of that form; one copy went to the Omaha office the following day after the conversation upon the telephone with the checker at 32nd Street and First Avenue, or the conversation of the evening, giving the tagging on the cars. One copy of the form is maintained at the elevator and one copy, as a general rule, was picked up the following morning by the car checker.

[fol. 452a] Defendant Rock Island Exhibit 18 is the switching order referred to on page 289 of Record with respect to which stipulation there appearing was made. No other offer in evidence of Exhibit 18 was made by any party.

Defendant Rock Island Exhibit 18 is on a form headed

"Lathrop Grain Corporation"

and is designated as a routing sheet with respect to car RI 145287. It discloses the following:

Car Number	Routing	Placed Date	Placed Hour	Released Date	Released Hour	Total Days Held
RI 145287	RI-UP	2/10	—	—	—	2

[fol. 452b) If a car were billed out on the 11th day of February, it would show up on a form such as Defendant Rock Island Exhibit 18, the date the car was loaded, pro-

vided that it graded that day; otherwise it would show the date the grade was issued to me, and the company gave me the tagging on it.

Examination by Mr. Anderson.

The grading of the corn is for the purpose of determining specifically what grade of corn you have. At that time, as a general rule, they telephoned over and ordered from the Omaha office to load No. 2 yellow corn. I would proceed to load the grain that I figured would make that [fol. 453] grade of corn. The sample would be taken from the car at the time the loading was completed, and just prior to the closing of the doors. It would then be sent over to Omaha to see whether the grade of corn was actually what was ordered. Assuming that the car was loaded and the sample was taken at approximately 4 or 5 o'clock on the afternoon of February 10, 1953, the result of that grading would not be known before 10:30 or 11:00 o'clock the following day. If Rock Island car 145287 was loaded between 4 and 5 p. m. on February 10, and the sample taken from it at that time, the result of the grading on this particular car would not have been known until February 11. There is no notification given the checker until after determination of the grade.

Q. The bill of lading, of course, cannot be made up until it can be determined whether the grade of corn would fill a particular order to go to a particular place, is that correct?

Mr. Howland: Objected to as purely argumentative, even on cross-examination if this be cross-examination, calling for an opinion or conclusion of the witness, and since examination is being made by a co-defendant, it is objected to also as leading and suggestive.

The Court: It is appropriate cross-examination because you inquired fully into all of these matters and they were permitted without objection. You may answer.

A. That is correct.

The routing of the car would not be determined until after the corn was found to grade in accordance with the order for the corn.

Q. Where the grade of the corn in Rock Island car 145287 was not determined until February 11, 1953, it would not be possible to determine the routing of that particular car until February 11, 1953.

[fol. 454] Same objections and ruling.

A. That is correct.

As far as I know, this inspection by Western Weighing and Inspection Bureau is simply an inspection of the box of the car to make sure there weren't any holes in the car that the grain might slide out of. It does not purport to be an inspection of the door mechanisms and so forth.

Q. Or the door posts or anything of that kind?
A. The door posts? That is a separate question? Yes.
Q. Of the Western Weighing and Inspection Bureau?

The Court: He says it does not purport to be an inspection of the door posts.

Mr. Anderson: That is what I wanted to clarify. It does not purport to be?

A. No.

The Court: As I understand the testimony of this witness on direct he testified that the inspection to which you are now referring was of the interior of the car, is that right?

The Witness: Your honor, the door post is a part of the interior of the car and the Western Weighing does inspect the interior portion of the door post of the car.

By Mr. Anderson:

Q. For grain tightness? A. Yes.
Q. Now this grain door that you talk about has no relation to the car door itself? A. No.

[fol. 455] Redirect Examination.

By Mr. Howland:

When these orders came to me verbally over the telephone to load up so many bushels of No. 2 yellow corn, for example, I don't know whether the Omaha office had orders on which they expected those cars to be applied when they were loaded. I don't know anything about that.

(Whereupon, at 5:00 p. m., October 17, 1955, the jury was admonished by the court, and was excused until 9:15 a. m., October 18, 1955.

The following occurred in the absence of the jury:

The Court: Gentlemen, will you turn to the cross claim of the defendant Chicago, Rock Island and Pacific Railroad Co.; against the defendant Union Pacific Railroad Company filed September 8, here.

In order to avoid any misunderstanding, counsel for the Rock Island stated this morning, in effect, that he was mislead by the conduct of the court in respect of this case because he had believed that all of it was to be submitted to a jury. Did I so understand you to speak this morning? If so, I will ask your colleague to read the prayer of that answer. [It] think it should be read for the record in view of what you said this morning, and my recollection of it.

Mr. Howland: I do not recall the exact statement that was made, if the court please, except that I believe that the statement was made by me that we had started the trial of the case, had concluded the taking of the plaintiff's evidence, and had begun on the introduction of the defendant's evidence before there was any intimation given that there would be separate trials with respect to the subject matter of the cross claims, and I recall also that you asked specifically whether it was my position that the request for a jury trial by counsel for the plaintiff was sufficient to enable the defendant which I represent to ask for a jury [fol. 456] trial, and I answered that in the affirmative, and the court said, "Very well, that is all. You may be seated." Now, that is my understanding of the record.

The Court: Very well. I want to make it clear that I was misunderstood if I said it, because I never intended to say that there would be separate trials as between the defendants later. I have said that in the event of an adverse result on appropriate issues made, there would be a determination made by the court as to liability as among the several defendants. I am going to ask counsel for the defendant, Mr. Webster, to read into the record the prayer of the pleading to which I have just referred, as filed September 8, which is a cross claim.

Mr. Webster: Are you referring to the answer of the Rock Island to the cross claim of the Union Pacific, your honor?

The Court: No, I am referring to the cross claim of the defendant Chicago, Rock Island and Pacific Railroad Company against the defendant Union Pacific Railroad Company.

Mr. Webster: You are asking me to read this now, your honor?

The Court: Just to read it into the record, yes.

(At this point, Mr. Webster read the prayer of the cross claim of defendant Chicago, Rock Island and Pacific Railroad Company against defendant Union Pacific Railroad Company filed September 8, 1955.

The Court: I just wanted that to be a part of the record. I wanted to call it to the attention of counsel, and I thought that was a better way to do it perhaps because it was a very definite request on the part of defendant Rock Island that the court shall make the determination and implies nothing at all about the jury doing so.

You may adjourn court until tomorrow morning at 9:15.

[fol. 457] (Whereupon, court adjourned at 5:05 p. m., October 17, 1955, until 9:15 a. m., October 18, 1955.) Upon reconvening of the court, the following-proceedings were had in the presence of the jury.

1

(Uniform Domestic Order Bill of Lading, adopted by carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.) (Form 31 Small 100M-11-53)

U.P. Ex. 1-A

UNIFORM ORDER BILL OF LADING—ORIGINAL

M.J.D. Shipper's No. 10-17-55

Agent's No. 4544

UNION PACIFIC RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, KANSAS GRAIN COMPANY

At COUNCIL BLUFFS, IOWA FEB. 11, 1953 From (Division of Flour Mills of America, Inc.)

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which [illegible] (each service also being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

Consigned to ORDER of KANSAS GRAIN COMPANY

Destination DENVER State of County of

Notify HOULTON GRAIN CO.

At DENVER, COLO. State of County of

Route UP

Delivering Carrier Car Initial RI Car No. 145287

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	* Weight (Sub. to Correction)	Class or Rate	Check Col.
1	CAR BULK CORN LFVC OGE WEIGHTS	112,000		
	**********	*****		
	*			
	* (Rubber Stamp)			
	* TRANSIT AUTHORIZED			
	* Inbound Tonnage Cancelled			
	*			
	* 912			
CANCELLED	* Feb. 11, 1953			
	* Western Weighing & Inspection			
	* Bureau			
	**********	*****		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per (The signature here acknowledges only the amount prepaid.)

Charges Advanced:

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

10:45 (Rubber Stamp) A.M. Feb 11 1953
J. A. Foral, G.A.F.D.
Per sgd Dargy

KANSAS GRAIN COMPANY, (Division of Flour Mills of America, Inc.) Shipper. Per DAH Agent. Per

Permanent postoffice address of shipper Omaha, Nebraska

J. J. COLLINS' SONS, INC., PRINTERS, CHICAGO

Dept. R.F.&, 15
2/27/90 10/17/51

8-1

CIRCULAR NO. T-225

(Supersedes Circular No. T-210 and Supplements thereto.)

Association of American Railroads

OPERATIONS AND MAINTENANCE DEPARTMENT

OPERATING - TRANSPORTATION DIVISION

U.S. DISTRICT COURT
FILED
AUG 13 1956
SO. DIST. OF IOWA

CODE OF CAR SERVICE RULES

A

CODE OF PER DIEM RULES

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ASSOCIATION OF AMERICAN RAILROADS

CAR SERVICE AND PER DIEM AGREEMENT

The subscribing railroad company promises and agrees with each railroad company severally which subscribes and files a counterpart hereof with the Secretary of the Operating—Transportation Division, Association of American Railroads, that the subscriber will abide by and enforce the rules prescribed for the handling of and settlement for freight cars and included in the Codes of Car Service and Per Diem Rules, promulgated by the Association.

Further, That the subscribing railroad company agrees to the creation of a Car Service Division with plenary powers, as provided in Per Diem Rule 19, and which Division shall be established and maintained at Washington, and shall co-operate with the Interstate Commerce Commission in all car service matters on and between all railroads; and generally to act for the subscriber as its Agent in all such car service matters as fully and as effectually as could the subscriber.

Further, That the said Car Service Division is hereby designated and appointed as the agent of the subscribing railroad company, upon which service of all orders and directions with respect to car service, in accordance with the provisions as to car service of the Act to Regulate Commerce in force at the time, may be made by the Interstate Commerce Commission for and in the subscriber's behalf; a duplicate original of this agreement being filed by the subscriber with the Interstate Commerce Commission to evidence such designation.

This agreement to continue until withdrawn by three months' previous notice in writing the Secretary of the Operating—Transportation Division of the Association.

DEFINITIONS.

Home Car.....A car on the road to which it belongs.
Foreign Car.....A car on a road to which it does not belong.
Private Car.....A car having other than railroad ownership.
Home.....A location where a car is in the hands of its owner.
Home Road.....The road which owns a car, or upon which the home of a private car is located.
Home Junction...A junction with the home road.
Subscriber.....A road which is a subscriber to the Car Service and Per Diem Agreement.
Non-Subscriber...A road which is not a subscriber to the Car Service and Per Diem Agreement.

CODE OF CAR SERVICE RULES—FREIGHT

(In effect January 1, 1953.)

RULE 1

Home cars shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable.

RULE 2

(A) Foreign cars on a direct connection must be forwarded to the home road loaded or empty in manner provided below:

(B) If empty at junction with the home road and loading at that point via the home road is not available, they must, subject to Rule 6, be delivered to it at that junction, unless an exception to the requirement be agreed to by roads involved. When holding road has no physical connection with the home road and is obliged to use an intermediate road or roads, to place the car on home rails under the provisions of this paragraph and the car has record rights to such intermediate road or roads, it may be so delivered.

(C) If empty at other than junction points with the home road, cars under this rule may be—

(1) Loaded via any route so that the home road will participate in the freight rate, or

(2) Moved locally in the direction of the home road, or

(3) When located in other than a Home District or a District contiguous thereto, loaded via any route to a destination within or in the direction of a Home District or to a destination within a District contiguous thereto (See Note D).

(4) Moved locally in an opposite direction from the home road, or delivered to a short line or a switching road, if to be loaded for delivery on or movement via the home road, or

(5) Delivered empty to home road at any junction point, subject to Rule 6, or

(6) Delivered empty to road from which originally received under load at the junction where received, or at another junction mutually agreed upon, if such road is also a direct connection of the home road, or

(7) Returned empty to the delivering road when handled only in switching service.

INTERPRETATIONS.

Question:—Under Rule 2 can a car, empty at junction with home road, be loaded via the home road via any junction point?

Answer:—Yes. (April 30, 1924.)

Question:—Does the word "moved" as used in Rules 2 and 3 mean "loaded or empty"?

Answer:—Both. "Loaded or empty." (April 30, 1924.)

Question:—If a foreign car, home on a direct connection is loaded contrary to the provisions of Rule 2, what is the obligation of the road so loading the car as to its subsequent movement?

Answer:—When a road receives a foreign car home on a direct connection in road haul service from a road which does not have a direct connection with the owner, it becomes its obligation to place the car on owner's rails. If, instead of doing so, it disposes of the car to a road not having a direct connection with the owner, it must accept the car from such road in home route if offered. (December 5, 1940.)

Question:—Can a car received from a connection for delivery to an industry within switching limits, for which the handling road receives its revenue as a division of the freight rate, be returned to the connection received from under the provisions of Rule 2 (C) (7)?

Answer:—Yes. (July 23, 1942.)

RULE 3

(A) Foreign cars at home on other than direct connections must be forwarded to the home road loaded or empty. Under this rule cars may be—

(1) Loaded via any route so that the home road will participate in the freight rate, or

(2) Loaded in the direction of the home road, or

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Endorsements
THE
HOULTON
GRAIN CO.
with initials
Rubber stamp of
Denver Branch
Federal Reserve
Bank of Kansas
City with date
February 16,
1953.
Illegible
rubber stamp,
and rubber
stamp of
Omaha Nation
Bank, Omaha,
Nebraska

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) **The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.**

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the holder to prove such negligence shall not relieve the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be liable for responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charges for storage and carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to take delivery thereof after notice of arrival of same has been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property will be refused or remain unclaimed, as the case may be, and that it will be subject to sale at the option of the said consignor at the place to which it was not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published, if any is so published. That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remained unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed, freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications of tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all such rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall [illegible] without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. [illegible] consignee shall not be legally liable for transportation charges said property, to a consignee other than the shipper or consignor, or after such consignee has been instructed by the shipper or consignor to deliver in respect of the transportation of said property they and those claiming against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property, and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that, if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water, the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, must be considered as made in or in connection with the substituted bill of lading, and shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route; and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water, the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms, provisions, and exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the limitation of vessels etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following sub-divisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, which this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or at appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall put into any port or ports, in or out of the customary route, to tow and be towed, for transfer, transship, or lighter, taking and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, or for dockage and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

EFFECTIVE JUNE 18, 1941

CODE OF PER DIEM RULES-FREIGHT

(In effect January 1, 1953.)

GOVERNING SETTLEMENT FOR THE USE OF RAILROAD OWNED FREIGHT CARS BETWEEN ALL COMMON CARRIER RAILROADS, EXCEPT AS PROVIDED FOR IN APPENDIX "B"

RULE 1

(a) The rate for the use of freight cars shall be $2.00 per car per day (See Note 1), which shall be paid for every calendar day and shall be known as the per diem rate; except that when per diem is not reported to car owner within four (4) months and ten (10) days from the last day of the month in which it is earned, the rate shall be increased fifteen (15) cents per car per day for each six months' period or fraction thereof that report of such per diem is thereafter withheld; provided that the aggregate increase in the rate shall not exceed 60 cents per car per day.

(b) Railroads may place refrigerator cars, Mechanical Designation "LRC" upon a mileage (instead of per diem) basis at the applicable rate of three and one-half cents per mile, or Mechanical Designations "RA", "RAM", "RS" or "RSM" upon a mileage (instead of per diem) basis at the applicable rate of three and one-half cents per mile upon notice to the Secretary, Operating-Transportation Division. The Secretary will advise all interested carriers accordingly, stating the effective date, which shall be the first day of the second month following the date of notice to the Secretary. Such arrangement must remain in effect at least one year and then may be canceled on thirty or more days' notice.

(See Note 2 for list of railroads which have placed refrigerator cars on a mileage basis under this Rule.)

(c) Railroads may place tank cars of their ownership, Mechanical Designation "TM", while in commercial service upon a mileage (instead of per diem) basis at the applicable rate of three cents per mile upon notice to the Secretary, Operating-Transportation Division. The Secretary will advise all interested carriers accordingly, stating the effective date which shall be not more than fifteen days after receipt of such notice by the Secretary and such basis of settlement shall remain in effect until fifteen days after owner's revocation is received by the Secretary.

(See Note 3 for list of railroads which have placed tank cars on a mileage basis under this Rule.)

Note 1:—Effective May 1, 1952, the rate for the use of freight cars owned by United States and Canadian roads, in the Republic of Mexico and for the use of freight cars owned by Mexican roads which are "Non-Resident Foreign Corporations" under the United States Revenue Laws, in the United States, shall be $2.75 per car per day, the added 75 cents to cover taxes required to be paid to the Mexican and United States Governments, respectively, by or for account of the car owners.

In the application of this Note, Mexican roads are classified as follows:

(a) Domestic (U. S.) Corporations:

San Diego & Arizona Eastern Ry. Co.
Nacozari R. R.
Mexican Northern Ry. Co.

(b) Non-Resident Foreign Corporations

Ferrocarril del Pacifico, S. A. de C, V.
Kansas City, Mexico & Orient Ry. of Mexico
Lineas Ferreas de Mexico, S. A. de C. V.
(Tehuantepec National Ry.)
Mexican Railway
Mexican Pacific R. R. Co.
Mexico North-Western Ry.
National Rys. of Mexico

Note 2:—The following roads have placed their refrigerator cars on a mileage basis under the provisions of this rule:

Railroad	Date Effective
Atchison, Topeka and Santa Fe	August 31, 1920
Bangor and Aroostook	September 1, 1950
Canadian National	March 1, 1931
Canadian Pacific	March 1, 1931
Delaware, Lackawanna & Western	February 1, 1949
Grand Trunk Western	January 1, 1942
Illinois Central	December 1, 1926
Northern Pacific	January 1, 1924
Pacific Great Eastern	November 1, 1952

Note 3:—The following roads have placed tank cars of their ownership on a mileage basis under the provisions of this rule:

Railroad	Date Effective
Atlantic Coast Line	August 1, 1952
Georgia & Florida R. R.	January 1, 1951
Minneapolis & St. Louis Ry	October 1, 1943
Seaboard Air Line R. R.	January 1, 1951
Texas & Pacific Ry	March 1, 1949

INTERPRETATIONS.

1 (c) Question:—Per diem is reported in error to the wrong road, and is not reported to the road owning the car in question within four (4) months and ten (10) days from the last day of the month in which the per diem is earned. Does the penalty rate apply in this case?

Answer:—Yes.

1 (d) Question:—Under Per Diem Rules 1 and 11 does the penalty rate apply in the case of per diem earned during the month of January which is reported in the Per Diem Report for April when the April report is dated to indicate it was rendered in accordance with Per Diem Rule 11, but which was actually mailed by the reporting road after the 10th day of the second month allowed by Per Diem Rule 11?

Answer:—Yes.

RULE 2

Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt shall be disregarded, and payment made for day of delivery.

A road receiving and delivering a car on the same date shall not pay the per diem for that day.

Records of receipt and delivery under this rule shall be those obtained from the reports provided for in Rule 9.

RULE 3

Freight cars must be handled as prescribed by Rules 1 to 6, inclusive, of the Code of Car Service Rules of the Association of American Railroads.

RULE 4

Each railroad, including ferry lines, shall be responsible to the car owner for amounts accruing for the use of a car at the established per diem rate, whether such car is in road or switching service.

INTERPRETATIONS.

4 (a) Question:—Should new or newly acquired cars enroute to owner, empty, under revenue billing be exempt from per diem?

Answer:—Yes.

4 (b) Question:—Should new or newly acquired cars moving direct to owner, loaded, be exempt from per diem?

Answer:—No, except when moving under a tariff provision which covers a charge for the transportation of the car itself.

4 (c) Question:—Must per diem be paid by a road for the "use" of a car, when it is out of repair, unfit for service, or lying idle?

Answer:—Yes, except as provided in Rule 8.

4 (d) Question:—When foreign railroad owned freight cars are used in the service of circus or carnival companies, should the roads over which they moved make settlement with car owners in accordance with Per Diem Rules?

Answer:—Yes.

CODE OF PER DIEM RULES AND INTERPRETATIONS—FREIGHT—CONTINUED.

RULE 5 ⑦

(a) An amount for each car in switching service, including a trap or ferry car, may be reclaimed by each individual switching road from the road for which the service was performed. This amount shall be based upon the average number of days, not to exceed five (5), for cars handled in Terminal Switching Service, including trap or ferry cars, except as otherwise provided in paragraph (b), actually required in such switching service to be determined annually, or at such other periods as may be agreed upon by the roads interested, by an examination of the records⑧ of each individual switching road, by the roads interested, for each local territory, except that roads in any local territory may agree to the settlement of terminal switching reclaims on the basis of actual time involved in handling the cars during the month for which the reclaim is made, subject to an agreed maximum number of days on any one car, the reclaim on pick-up and diverted cars shall be determined by a plan to be agreed upon by the interested roads, and the total reclaim for any month shall not exceed an average of five (5) days per car.

(b) An amount equal to the actual per diem accruing on each car loaded with live stock handled in switching service (but not including cars loaded with emigrant movables or exhibition live stock, which are subject to Section (a) of this rule) may be reclaimed by each individual switching road from the road for which the service was performed, provided that such reclaim shall not exceed one (1) day on any one car.

(c) Except as provided in paragraph (d), an intermediate switching road may reclaim one (1) day's per diem only from the delivering road on any car on which per diem accrues while in intermediate switching service; however, a car handled in intermediate switching service which is delayed on the intermediate switching road over midnight of the date received on account of being held under Rule 15 is not subject to intermediate reclaim.

A terminal switching road delivering a car to an intermediate switching road for delivery to a carrier road shall pay the reclaim to the intermediate switching road and may reclaim such amount from the carrier road for which the service was performed.

(d) No reclaim shall be allowed for an inter-terminal switching movement.

(e) Unless otherwise unanimously agreed to by the interested roads, the Code of Switching Reclaim Rules of the Association of American Railroads shall govern in determining switching reclaim allowances.

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⑦NOTE.—When checks for the purpose of establishing or revising arbitraries under the provisions of Per Diem Rule 5 involve roads for which no switching is performed or when checks are made under the supervision of the Association of American Railroads, the cost will be prorated among the interested lines on the basis of the number of cars handled in terminal switching service for each line during the year covered by the check, unless otherwise unanimously agreed.

When checks are made to establish arbitraries on cars handled in intermediate switching service, the cost will be prorated among the interested lines on the basis of the number of cars handled in that service for each line.

When checks are made covering cars handled in both terminal and intermediate switching service to establish arbitraries, the expense will be separately prorated among the interested lines on the basis of the number of cars handled for each line in each class of service.

⑧NOTE.—The examination of records, to determine switching reclaim allowances applicable between short line railroads less than one hundred miles in length, and connecting carriers, shall be supervised by the General Committee, Operating-Transportation Division, Association of American Railroads, and that Committee may initiate these examinations.

INTERPRETATIONS.

5 (a) Question:—Does Rule 5 apply when switching charge is assessed on a ton instead of a car basis?

Answer:—Yes.

5 (g) Question:—Carrier road "A" delivers a loaded car to road "B" to be switched by the latter to industry on its line for unloading. Before the car is unloaded and without changing the load in any manner, it is ordered to road "C" where it is unloaded at an industry located on road "C" within the same switching limits. Road "B" receives two switching charges for handling the car, and road "C" also receives a switching charge. Is road "B" entitled to a reclaim from road "A" in view of the fact that the car was not unloaded? If not, is road "C" entitled to reclaim from road "A"?

Answer:—Road "B" is entitled to reclaim from road "A." The movement from road "B" to road "C" comes within the definition of inter-terminal switching service and no reclaim should be allowed.

5 (h) Question:—Carrier road "A" delivers a loaded car to road "B" for switching movement to consignee. Consignee refuses car on account of quality and car is returned to road "A" to await disposition. Shipper orders car to an industry on road "C" within same switching limits, at which point it is unloaded. Is this an intermediate switch and reclaim due road "C," or should road "B" collect reclaim?

Answer:—Road "B" is entitled to reclaim from road "A" for the original inbound movement. The return movement from road "B" to "A" to "C" was inter-terminal switching and no reclaim should be allowed.

5 (i) Question:—Carrier road "A" delivers a loaded car to road "B" for switch movement to consignee. After car is placed for unloading, carrier road "A" instructs road "B" to re-card car to a point beyond the switching limits via road "C." Is road "B" entitled to a reclaim from road "A" on the inbound movement and another reclaim from road "C" for the outbound movement?

Answer:—Yes.

5 (j) Question 1:—Is a check of the records to establish the reclaim allowance under Rule 5 has not been made within a period of one year and one of the interested roads makes a request for such check, is it the intention of the rule that the check shall be made?

Answer:—Unless there is an agreement to the contrary, a road may demand a check of the records to determine the arbitrary reclaim under Per Diem Rule 5 when such check has not been made within a period of one year, and the other roads interested at that point are obligated under the rule to participate in such check. The rules provide that the reclaim made by each switching road shall be based on the average time required by such switching road to switch cars for all roads considered as a whole.

Question 2:—If one or more of the roads involved does not agree to join in such check, what action is necessary to secure compliance with the rule?

Answer:—(a) If a road performing switching service does not agree to have its records checked, the road making the request may give notice that it will not pay reclaims accruing after the date of such notice. The switching road will have no right to present further reclaims until a check has been made in accordance with the Code of Switching Reclaim Rules and the revised reclaim allowance established, which shall then apply to reclaims presented in accordance with Rule 13 (a).

(b) If a carrier road does not agree to join in a check to establish a revised reclaim allowance, the switching road may give notice that it will check its records in accordance with the Code of Switching Reclaim Rules and thereby establish its revised reclaim allowance. After the date of such notice, the switching road will have the right to present reclaims in accordance with Rule 13 (a) at such established reclaim allowance.

5 (k) Question:—Is the intermediate switching road entitled to reclaim when the car is not handled on a switching charge?

Answer:—Reclaim may be made on any car, loaded or empty, on which per diem accrues while in intermediate switching service, except on cars handled under Car Service Rule 5, cars on which the intermediate switching road participates in the freight rate and cars in inter-terminal switching movement.

5 (l) Question:—When is an empty car, moving over an intermediate switching road considered as in inter-terminal switching service?

Answer:—An empty car is considered in inter-terminal switching service—

(a) When, after having been received loaded in inter-terminal switching service, and without having been diverted to other service, it is returned to intermediate road for movement to the originating road, to the owner, or to another road under proper authority.

(b) When furnished and used for loading in inter-terminal switching service.

Circular No. T-199 (Supersedes Circular No. T-59.)

ASSOCIATION OF AMERICAN RAILROADS.
Operations and Maintenance Department
Operating-Transportation Division
59 East Van Buren Street, Chicago 5.

August 1, 1949.

UNIFORM APPLICATION OF PER DIEM RULES TO CARS DELIVERED INDUSTRIES AND TAKEN OUT AND/OR FORWARDED BY OTHER THAN THE DELIVERING ROAD.

To the Members:

The Committee on Car Service recommends the following methods for uniform application in determining date of interchange when cars delivered to industries are taken out or forwarded by other than delivering road:

(a) INTERCHANGE VIA INDUSTRIES NOT PERFORMING THEIR OWN SWITCHING

Except as Provided in Section (c):

1. When loaded cars delivered to and unloaded by an industry are reloaded by the industry and delivered in outbound movement to other than the road from which received, they should be interchanged as of the date and time actually or constructively placed for loading.

2. When loaded cars delivered to and unloaded by an industry are taken out empty by a road other than the inbound road, they should be interchanged as of the date and time released from the inbound load.

3. When cars delivered to an industry under load are (a) partially unloaded, (b) held to finish loading, (c) reconsigned or (d) reshipped, and delivered to other than the road from which received, they should be interchanged as of the date and time necessary data for forwarding is delivered to the outbound road.

4. When empty cars delivered to an industry are loaded to other than the road from which received they should be interchanged as of the date and time actually or constructively placed

5. When cars delivered empty to an industry on orders for loading are not loaded outbound, but are taken out empty by other than the road from which received, they should be interchanged as of the date and time released by the industry.

6. When cars are delivered empty to an industry and are taken out empty by a road other than the one setting them in, they should be interchanged as of the date delivered to the industry, except as provided in paragraph 5.

(b) INTERCHANGE VIA INDUSTRIES PERFORMING THEIR OWN SWITCHING

Except as Provided in Section (c):

1. When loaded cars, after being unloaded, are reloaded by the industry and delivered to another road, they should be reported as interchanged as of the date and time released from the inbound load.

2. When loaded cars, after being unloaded, are returned by the industry empty to other than the road from which originally received, they should be reported as interchanged as of the date and time delivered on the interchange track of the outbound road.

3. When empty cars, after being loaded, are delivered by the industry to another road, they should be reported as interchanged as of the date and time actually or constructively placed by the delivering road.

4. When empty cars are not loaded outbound by the industry but are returned empty to another road, they should be interchanged as of the date and time delivered on the interchange track of the outbound road.

5. When loaded cars are (a) partially loaded, (b) partially reloaded (c) reconsigned or (d) reshipped, and delivered to other than the road from which received they should be interchanged as of the date and time delivered on the interchange track of the outbound road and necessary data for forwarding is delivered to the outbound road.

(c) INTERCHANGE VIA COAL MINE OR COKE OVEN INDUSTRIES:

Empty coal cars, after being loaded, delivered by the industry to another road, should be reported as interchanged as follows:

When owned by delivering road, as of date and time that forwarding instructions are issued.

When owned by forwarding road, as of the date and time placed for loading.

When owned by other than delivering or forwarding road, as of date and time that forwarding instructions are issued.

It is recommended that all members of the Association be governed accordingly.

On behalf of the General Committee.

Respectfully,
L. R. Knott,
Executive Vice-Chairman.

THE HOULTON GRAIN COMPANY
WHOLESALE GRAIN

No. 11293

Denver 2, Colo., 2/10/53

Kansas Grain Co.
Farm Credit Building
Omaha, Nebr.

We herewith Confirm PURCHASE from you

By The United Grain Co. #73489

Quantity 10 Cars - 112,000# each

Grade #2 or better yellow corn

Price $1.52 Bu.

Basis Denver

Routing UP

Time of Shipment One car each working day starting today or tomorrow

Billing Denver

GUARANTEED TO ARRIVE COOL & SWEET AT FIRST BILLED DESTINATION

Weights Omaha

Grades Omaha

Draw on us at Denver, Colo., with Bill of Lading attached, leaving sufficient margin to cover contingencies of weight and grade.

This contract, unless otherwise specified, is subject in all respects to the rules and regulations of the Denver Grain Exchange Association.

If any part of this contract remains unfilled at expiration the buyer reserves the right to extend time of shipment, to cancel contract (charging loss of cancellation, if any, to the seller) or to buy same for seller's account.

If not filled within specified time this contract is hereby considered and agreed to as an open contract and in full force until buyer's cancellation shall have been received by seller prior to date of loading grain. Date of original bill of lading to be accepted as final in determining loading date governing this contract.

If any feature of this contract is not in accordance with your understanding or is not agreed to, WIRE US IMMEDIATELY ON RECEIPT OF THIS CONFIRMATION.

Manifest errors excepted.

THE HOULTON GRAIN COMPANY,

By W. D. Houlton

CODE OF PER DIEM RULES AND INTE

RULE 5—*Continued.*

5 (m) Question:—A car moving into a junction point over Road "A" is delivered to Road "B" for handling in terminal switching service in connection with stop or milling-in-transit tariff authority, Road "B" not participating in the freight rate, and the shipment is subsequently delivered by Road "B" to Road "C" for outbound road movement. Should Road "A" pay to the terminal switching road the unloading reclaim and Road "C" pay to the terminal switching road the loading reclaim?

Answer:—Yes, regardless of subsequent adjustments of switching charges.

5 (n) Question:—When a car stopped in transit under tariff authority is delivered to a switching road to partly unload or to complete loading, the switching road being allowed two terminal switching charges, i. e., one for the inbound and one for the outbound movement, is the terminal switching road entitled to two terminal switch reclaims?

Answer:—Yes.

5 (o) Question:—When a road, which participates in the freight rate, is allowed under tariff authority a terminal switching charge on a car handled in connection with stop or milling-in-transit service, is such road entitled to terminal switching reclaim?

Answer:—Yes, regardless of subsequent adjustments of switching charges.

JAMES K. FRANKS called and sworn on behalf of defendant, C.R.I.&P. R.R. Co., testified as follows:

Direct Examination.

By Mr. Howland:

I am 21 years of age and live in Omaha, Nebraska. I am traffic manager for the Kansas Grain Company at Omaha. I have worked for Kansas Grain Company a little less than [fol. 458] five years. I was not traffic manager for the Grain Company in 1953. I was employed then as a messenger. I have custody of the records of the company pertaining to the making of the shipments, bills of lading and matters of that character, including the contracts and orders and bills pertaining to shipments that have been made in the past. I have the contracts and the orders and confirmations. Defendant U.P. Exhibit 1 is a form used by the Kansas Grain Company for making shipments during the month of February, 1953. It is a uniform shipper's order bill of lading. The notation "Kansas Grain Company, shippers, Division of Flour Mills of America, Inc., per D.A.H." are the initials referring to Donald A. Hutchison who was traffic manager at that time, and my predecessor in that particular job. I have in my possession the original order and the confirmation of that order from the Houlton Grain Company which pertains to the bill of lading, Defendant U.P. Railroad Exhibit No. 1.

(Defendant C.R.I.&P. R.R. Co. Exhibit No. 19 marked for identification.)

Defendant Rock Island Exhibit No. 19 is a contract, or confirmation received from Houlton Grain Company for ten cars of No. 2 yellow corn. The making of contracts and the sales of grain would be handled by the manager of the Omaha office.

Defendant Rock Island offers and introduces in evidence Defendant Rock Island Exhibit No. 19.

Mr. Anderson: The offer of the exhibit is objected to for the reason there has been no sufficient foundation laid

[fol. 459] for the introduction of the same into evidence; that it does not tend to prove or disprove any issue in the case, and is utterly immaterial, and for the further reason that it is hearsay as to the defendant U.P. Railroad Company, and not binding upon us in any way.

Mr. Beckman: Plaiptiff objects on the ground of materiality.

The Court: I will sustain the objection.

Mr. Howland: At this time, we desire to offer and introduce defendant U. P. Railroad Company Exhibit No. 1.

Received in evidence without objection.

(Defendant C. R. I. & P. R. R. Co. Exhibit No. 20 marked for identification.)

Defendant Rock Island Exhibit No. 20 is a contract offered by Kansas Grain Company to Houlton Grain Company for 20,000 bushels of No. 2 yellow corn. Defendant Rock Island Exhibits 19 and 20 is the record of the Kansas Grain Company kept in the usual course of business in buying and selling grain. At the request of counsel, I have produced Defendant Rock Island Exhibits 19 and 20 from the records of Kansas Grain Company regularly kept in my office.

Exhibits 19 and 20 were offered in evidence on behalf of Defendant Rock Island.

The Court: Do you happen to know if the entries were made at the time of the transactions there recorded?

The Witness: On Rock Island Exhibit No. 20, yes, sir, there are.

The Court: You don't know anything about Exhibit 19?

The Witness: It is received at the time the sale is made. Yes, that is true.

[fol. 460] The Court: Is that record made at or about the date appearing on Exhibit 19?

The Witness: Yes, it was; that is true.

Mr. Anderson: Defendant U. P. Railroad Company objects on the ground that no sufficient foundation has been laid for its admission in evidence, and it is utterly immaterial to any issue in this case between Union Pacific and any other parties and for the further reason that anything that is shown on here is utterly hearsay as to Defendant U. P. Railroad Co., and is not binding on defendant U. P.

The Court: Is there any objection on the part of counsel for plaintiff?

Mr. Beckman: Plaintiff feels that it is immaterial as between the plaintiff and these defendants, and for the further reason there are some figures appearing thereon that have not been explained as to when they were placed thereon.

The Court: I will sustain both objections at this time. As far as plaintiff is concerned, it doesn't make any difference whether there was an order for 20,000 bushels of corn, 200,000 or 2,000,000. I fail to see its materiality so far as this case is concerned.

Mr. Howland: I only wish to state to the court that the purpose of the offer is to show that the purchaser specified U. P. routing.

(Defendant C. R. I. & P. R. R. Co. Exhibit No. 21 marked for identification.)

Mr. Howland: It is conceded by plaintiff and all the defendants that the book marked as Defendant R. I. Exhibit 21 constitutes the Association of American Railroads Code of Rules governing the condition of and repairs to freight [fol. 461] cars for the interchange of traffic effective January 1, 1953. Identification of the exhibit is waived by all the parties and no question of authenticity is raised; it is conceded that the three defendant railroad companies are subscribers to, or parties signatory to the Code of Rules.

Defendant Rock Island desires to offer and read in evidence the following rules: Rule 1, Rule 2 appearing on Page 11 but not including the last sentence nor the portion on pages 12 and 13. We also offer Rule 4 on page 32 thereof.

The Court: Does plaintiff have any objection to the offer?

Mr. Peterson: We have no objection.

Mr. Anderson: Defendant Union Pacific objects on the ground that it is completely irrelevant to any issue in this case and immaterial.

The Court: I believe this likewise is a matter that should be discussed in the absence of the jury.

Mr. Howland: We have some requests for admissions which I believe the court has ruled are proper for consideration by the jury and Mr. Webster will read those at this time.

The requests of defendant Rock Island for admissions of fact were thereupon offered in evidence and read to the jury as follows:

Mr. Webster: (Reading— "1. Flour Mills of America, Inc., now operates and at all times material, did operate a terminal grain elevator under the trade name and style of Kansas Grain Company at 30th Street and First Avenue in the City of Council Bluffs, Iowa. This elevator is hereafter referred to in these requests as "Kansas elevator." Flour Mills of America, Inc., maintains an office in Omaha, [fol. 462] Nebraska under the trade name of "Kansas Grain Company."

"2. The Kansas Elevator, at all times material had a storage capacity exceeding one and a half million bushels.

"3. The Kansas Elevator continually received, shipped and stored large quantities of grain, practically all of which moved to or from the elevator in railroad box cars, over all major lines of railroads serving the Omaha and Council Bluffs area.

"4. The Kansas Elevator is, and was located adjacent to, and at all times material has been served by a railroad industry track known as the "River Track", which was constructed in First Avenue by authority of the city council of the city of Council Bluffs many years ago by Chicago and Northwestern Railway Company.

"5. The switching of cars on the River Track and the setting of same to the elevator and removal therefrom has, for many years, been done by crews and engines of Chicago and Northwestern Railway.

"9. In February, 1953, and prior thereto, it was the custom and practice for the officers and employees of the Kansas elevator to place orders for cars substantially in advance of the needs of the elevator for actual loading, and empty cars were supplied by the railroad with which the order was placed, as cars were available. On January 28 and January 29, 1953, officers and employees of the Kansas elevator placed orders with Chicago, Rock Island & Pacific Railroad Company for a total of thirty-five (35) cars for grain loading.

"11. On February 9, 1953, at approximately 5:00 a. m., a switch crew of the Chicago, Rock Island and Pacific Railroad Company set out on the 17th Street connecting track to the River Track, at the customary place for cars moving to the Kansas elevator, three empty cars for grain loading. [fol. 463] One of the cars was owned by Chicago, Rock Island & Pacific Railroad Company bearing the initials and numerals R. I. 145287. This car was inspected by an inspector employed by Chicago, Rock Island & Pacific Railroad Company on February 7 —

Mr. Anderson: Your Honor, pardon me. It is my understanding that that read "this car was inspected for grain loading."

Mr. Webster: That is correct. "This car was inspected for grain loading by an inspector of the Chicago, Rock Island and Pacific Railroad Company on February 7, 1953, and a placard reading "O. K. for grain loading was placed on the car at that time."

"12. During the day or evening of February 9, 1953, a switch crew of Chicago & Northwestern Railway Company moved car RI 145287 from the 17th Street connecting track and set the same on a siding west of and at the Kansas elevator in the usual position where empty cars for loading at the elevator were set out by Chicago & Northwestern Railway Company.

"13. During the afternoon of February 10, 1953, car RI 145287, together with one or more other cars, was loaded with grain by employees of Kansas elevator.

"14. Cars were loaded at the Kansas elevator only upon directions from the Omaha office. No orders were given to load grain except in expectation of immediate outbound shipment, and to complete, or fill, specific contractual commitments, or orders, of the grain company.

"15. The usual custom and practice followed by employees of the Omaha office was to call the elevator by telephone and direct the loading of a specified number of bushels of wheat, corn, rye or oats and the grade of such grain."

"18. Upon completion of the loading, the usual custom [fol. 464] and practice of the elevator employees was to close the doors of the grain cars and place seals thereon, after samples were taken for inspection and grading by the Omaha Grain Exchange at Omaha, Nebraska.

"19. Samples of grain were taken from each car and sent by messenger to the Omaha Grain Exchange where they were carefully inspected and graded. The inspection and grading process took a period of approximately one-half day. Samples taken during the afternoon hours were customarily inspected and graded some time during the morning hours of the following day.

"20. No bills of lading were made up by Kansas Grain Company or tendered to any railroad company for signature until the result of the inspection and grading was known to the office of Kansas Grain Company.

"21. On the morning of February 11, 1953, the Omaha office of the grain company made up and tendered to a traffic representative of Union Pacific Railroad Company, shipper's order bill of lading, in form prescribed by classifications and tariffs of Western Railroads, for car RI 145287, for shipment from Kansas Grain Company (division of Flour Mills of America, Inc.) at Council Bluffs, Iowa, consigned to Kansas Grain Company, Denver, Colorado; notify Houlton Grain Company, Denver, Colorado.

"22. At or about 10:45 a. m. on February 11, 1953, a traffic representative of Union Pacific Railroad Company signed said bill of lading on behalf of said defendant.

"23. It was the custom and practice for the employees at the Omaha office of Kansas Grain Company to notify employees at Kansas elevator in Council Bluffs of the routing of each car by telephone at the time of or shortly after bills of lading for particular cars were prepared. The employees at the Kansas elevator in Council Bluffs custom-
[fol. 465] arily notified a yard checker employed by Chicago & Northwestern Railway Company to handle records of cars on the River Track of the outbound routing of such car, and it was customary, either that same day or within a few hours thereafter, for the Kansas elevator employees in Council Bluffs to make up a so-called switching order and deliver the same to the yard checker.

"24. In this instance a switching order, including car RI 145287 along with certain others, was made up dated February 11, 1953 and delivered to the yard checker on or about February 11, 1953.

"25. Defendants Union Pacific Railroad Company, Chicago & Northwestern Railway Company and Chicago, Rock Island & Pacific Railroad Company were, in February, 1953, parties to the association of American Railroads Code of Rules governing the condition of and repairs to freight cars and for the interchange of traffic between railroads. All of said railroad companies had executed the so-called freight car interchange rules agreement in conformity to the Code of Rules set forth above.

"26. Following the occurrence of the injury to plaintiff, car RI 145287 was switched from the Kansas elevator by an engine and crew of Chicago & Northwestern Railway Company to the point at which cars were customarily received by Chicago, Rock Island & Pacific Railroad Company, and said car was removed by a switch crew of Chicago, Rock Island and Pacific Railroad Company to a track known as the repair track in the yards of Chicago, Rock Island & Pacific Railroad Company, in the city of Council Bluffs, Iowa.

"29. Union Pacific Railroad Company performed transportation service with its own engines and crews from the pool yard in Council Bluffs, Iowa, to Denver, Colorado."

[fol. 466] Mr. Davis: We have no witnesses that bear on plaintiff's case at all.

Mr. Anderson: Whether we have witnesses will depend on to some extent whether these A.A.R. rules are admitted. I do have three requests for admissions that were asked by C.R.I.&P.R.R.Co. and admitted by all parties, which were not read to the jury by the Rock Island and which I now desire to read to the jury as part of the Defendant Union Pacific case. They are numbered 27, 28 and 38.

Mr. Howland: The offer of Paragraphs 27, 28, are objected to by the Rock Island because of the ruling of the court with respect to our other requests for admissions, as immaterial to any issue now before the court or jury. If the ruling of the court had been otherwise with respect to certain other phases of the matter we would have no objection.

The Court: I shall overrule the objections of the Rock Island for the reason it is part of the story of the handling of the car that was involved in plaintiff's injuries and consequently, I shall permit the reading of these requests for admissions which were made by the Rock Island and acquiesced in by all of the other parties, and I think despite the latter rulings to which you refer, it becomes helpful to

the jury as tracing the history of this car, which I have decided should be traced clear through to its departure for the West. So you may read 27, 28 and 38 of the requests for admissions by the Rock Island.

(Rock Island requests for admissions Nos. 27, 28 and 38 were offered in evidence and read to the jury by Mr. Anderson.)

Requests for admissions, Paragraphs 27, 28 and 38 are as follows:

[fol. 467] 27. Car RI 145287 remained in the physical possession of Chicago, Rock Island & Pacific Railroad Company until February 23, 1953, at which time it was set out by a switch crew of Chicago, Rock Island & Pacific Railroad Company on a track in the so-called pool yard in Council Bluffs, Iowa, at which Union Pacific Railroad Company customarily received cars in interchange from Chicago, Rock Island & Pacific Railroad Company.

28. Car RI 145287 was taken by a switch crew of Union Pacific Railroad Company from the pool yard referred to in the foregoing interrogatory shortly after midnight on February 24, 1953.

38. Car RI 145287 was inspected by Union Pacific Railroad Company on February 24, 1953.

[fol. 468] (At this point, the jury was admonished and excused for the morning recess.)

The following proceedings were had in the absence of the jury.

Mr. Howland: May it be agreed, Mr. Davis, that subject to any objections that you desire to impose as to the relevancy or otherwise, that according to the deed records in the Office of the County Recorder, Pottawattamie County, Chicago, Rock Island & Pacific Railway Company, by its trustees, conveyed the elevator property now owned and referred to in this record as Kansas Grain Elevator,

to one James Welsh by deed recorded February 24, 1947; that James Welsh conveyed the same property to Butler-Welsh Grain Company by deed recorded August 20, 1947; that Butler-Welsh Grain Company conveyed the property to Lathrop Grain Company by deed recorded August 6, 1948 and subsequently the property was conveyed to Flour Mills of America, Inc. by deed recorded on February 26, 1955.

Mr. Davis: We will stipulate that the record of the County Recorder of Pottawattamie County so shows. However, we object to the introduction in evidence in this case of these records, or the stipulation, for the reason that the same are incompetent, irrelevant and immaterial to any issue tendered under the pleadings herein and between plaintiff and any of the defendants and they are likewise immaterial as between defendant Rock Island and defendant Northwestern on their cross claims agains each other.

The Court: What is the purpose?

Mr. Howland: The purpose is to show that certain of [fol. 469] the contracts pleaded in the cross claim of the Chicago and Northwestern Railway Company against its co-defendants were abrogated, and were not effective on the day this injury was sustained by the plaintiff. It is the position of counsel for defendant Rock Island that this is a proper offer on the main case.

The Court: Is there any comment on the part of plaintiff?

Mr. Beckman: The position of counsel for plaintiff is that as between the plaintiff and these defendants the stipulation and offer are wholly immaterial. We would be willing, subject to objection, as to materiality, to stipulate as counsel for the Northwestern and Rock Island have stipulated here, and that Kansas Grain Company is now the owner of that elevator.

The Court: I will exclude the offer of proof on the basis of plaintiff's objection.

ELMER E. SMITH recalled as a witness on behalf of defendant C.R.I.&P.R.R.Co., and in the absence of the jury testified as follows:

Further Direct Examination

By Mr. Howland:

As local freight agent for C.R.I.&P.R.R.Co., I have custody of the records of the local freight office with respect to the movement of cars and particular car Rock Island 145287.

Q. Is it customary in this territory in the Council Bluffs-Omaha terminal for any charge to be made to a shipper for an empty car by the railroad that supplies the car?

Defendant Union Pacific objects to the question as utterly immaterial to any issue in the case and no sufficient foundation laid.

(Question withdrawn)

[ofl. 470] I have been local agent for the Rock Island at Omaha, Nebraska, and Council Bluffs, Iowa for five years, nine months and eighteen days. I am familiar with the customs and practices of railroad companies in the Council Bluffs, Iowa-Omaha, Nebraska, area with respect to supplying empty cars for loading. I am the man in charge of two offices of the Rock Island Railroad, one at the freight house in Omaha, Nebraska, and one at the station in Council Bluffs, Iowa. No one in Council Bluffs or Omaha is superior to me with respect to these stations. I am familiar with the customs and practices followed by railroad companies generally in the Omaha-Council Bluffs area with respect to making a charge against a shipper for the movement of an empty car to the shipper's industry for loading.

Q. I will now ask you to state to the court what that custom and practice was as it existed on the 9th, 10th and 11th day of February, 1953.

Mr. Anderson: Defendant Union Pacific objects as immaterial and irrelevant to any issue between plaintiff and defendant Union Pacific and between plaintiff and any of the defendants. It would only serve to confuse the jury and becloud the issues properly before the jury.

Mr. Beckman: Due to the fact that this interrogation of the witness is taking place outside of the presence of the jury, and due to the fact that Mr. Smith is here, I do not know whether the court might wish to proceed and hear this witness outside the presence of the jury in arriving at any decision it might ultimately make on this cross claim. However, we join the Union Pacific in the objection insofar as it pertains to materiality and relevancy as to plaintiff's claim against these three defendants.

[fol. 471] The Court: I will sustain the objection of plaintiff and for the present that of defendant Union Pacific, because I do not believe that this record should be encumbered—even though you might be willing to permit it for the future purpose—I do not believe this record should be encumbered with this matter, but that does not deprive you of the opportunity at a later and appropriate time to present the matter. That would be after the trial of the issues between the plaintiff and you and the other defendants.

Mr. Howland: I understand the position of the court. We desire to offer to prove at this time that in the month of February, 1953, no charge was ever made against a shipper for the supplying of an empty car, that service being included in and being a part of the outbound movement of the car after it was loaded and billed.

(The objections were renewed by defendant Union Pacific and plaintiff on the same grounds previously urged and the court made the same ruling.)

Q. (By Mr. Howland) Now, Mr. Smith, have you the records here which will show whether the Defendant Rock Island received from Union Pacific Railroad Company any

sums for switching the car from the Kansas Grain Company to the line of the Union Pacific Railroad? You may answer that yes or no, if the court permits you to answer.

Mr. Beckman: Same objection, your honor.

Mr. Anderson: Same objection.

The Court: I fail to see that there is any other ruling I can make than one consistent with the prior position of the court, and I sustain both objections.

[fol. 472] Mr. Howland: And at this time we offer to prove, and state that the witness, if permitted to answer, will testify that the records kept under his custody and direction, and now in his possession and available in the court room, will disclose that Chicago, Rock Island & Pacific Railroad Company has never received any payment from U.P. Railroad Company for the service of movement of the car from the elevator of Kansas Grain Company to the pool yard or connecting track where the car was received by U.P. Railroad Co.

In this same connection, we offer to prove that under the custom and practice, and in accordance with the tariff provisions which were referred to by the witness Christiansen on yesterday, that in the normal and usual course of the business, defendant Chicago, Rock Island and Pacific Railroad Co. would have received a switching charge of $4.86 for the movement of car RI 145287, inbound for loading, and outbound for movement to Union Pacific, but that in the present instance, the car, RI 145287, was stricken from the list of cars delivered to Union Pacific Railroad Company in terminal switching, and that at the time the list was furnished, the car, RI 145287, had not reached the defendant Union Pacific Railroad Company.

Mr. Beckman: Same objection by plaintiff, your honor.

Mr. Anderson: The defendant Union Pacific Railroad Company objects to the questions and the offer in connection therewith on the ground that it is immaterial and irrelevant; and also with respect to the particular offer with

regard to the so-called switching charge of $4.86 as contrary to the pleadings of the defendant Chicago, Rock Is- [fol. 473] land and Pacific Railroad Company, and to their requests for admissions.

The Court: Well, I will sustain the objection of the plaintiff and the objection of the Union Pacific so far as the relevancy and materiality is concerned, without going into the other problems, and on the usual conditions so far as the Rock Island is concerned as to future presentation of it.

Do you have anything further with this witness?

Do you have other proof?

Mr. Howland: At this time the Rock Island rests.

The Court: I think it should be called to your attention that you had indicated some intentions in respect of this Rule book.

Mr. Howland: Now in order to complete the record, at this time we desire to reoffer the defendant Rock Island Exhibit No. 19. The court will recall that there was some further examination after the previous ruling, and some examination by the court. And I merely desire to complete the record in that respect.

The Court: Well, the ruling of the court, assuming the objections are the same, will be the same.

Mr. Beckman: That is correct, your honor, plus the additional objection to 19 as was stated to 20, that there is certain writing, as to when or how it was placed thereon, so there is insufficient foundation.

Mr. Anderson: Same objection.

The Court: 19 is excluded, and as likewise was exhibit 20.

Mr. Howland: That leaves for consideration the status of the offer of the Code of Rules of the Association of American Railroads, as found in exhibit 21.

The Court: Well, now, that, as I understand, is some-
[fol. 474] thing to which all the railroads are signatory, is it not?

Mr. Howland: That is correct.

The Court: What is the purpose of that offer so far as the issues existing between the plaintiff and the defendant Rock Island?

Mr. Howland: It is to explain the occasion for the taking of the car back to the Rock Island Yard for repairs. That is one purpose. Another purpose is to show that the car under billing is in the possession of the billing railroad, legally in possession. That is, of course, in accordance with the per diem rules which we offered on yesterday and which were excluded by your honor.

Mr. Anderson: What rule do you state shows that? What rule do you have reference to on that last item?

Mr. Howland: "Empty cars furnished on orders for specific lading must be in serviceable condition for such lading, the receiving road to be the judge."

Now, that indicates very clearly in my way of thinking that when the Union Pacific elected to accept the billing on the car that under this rule they became responsible for the condition of the car. There are other provisions, also. I don't care to prolong the discussion.

Mr. Anderson: Well, I wouldn't think so. The railroads, of course, are signatorie to this rule. I want to make this explanation in connection with it—the rules have absolutely nothing to do with the question of responsibility for personal injury. When they talk about condition of the cars and that sort of thing, the rules only have reference to some damage that might occur to a car when on the line of the road with respect to which damage the cost of repair of the particular item of damage would be chargeable against the Road upon which line the Road is,
[fol. 475] back to the owner. They have nothing—and the Rock Island itself—I think Mr. Howland will bear me out—asked for an interpretation a number of years ago

from the A.A.R. committees that interpret these rules as to whether there was any applicability of these rules to personal injuries.

Mr. Howland: I know nothing about that.

Mr. Anderson: Well, I will submit the photostatic copy to you. But coming back to the main question, the plaintiff is not a party to these rules. Now, they certainly have no bearing on any issue here, and certainly they tend to confuse the issue, and which only issue that is being heard here is the plaintiff's contentions as against these defendants, and certainly they have no bearing on that situation, and they could only confuse this issue. We would want to put in all kinds of testimony very likely on that proposition if there was any effort to put them in. They are not, incidentally, rules that I think are entirely clear in themselves. They require extensive explanation, but they are immaterial and irrelevant to any issue as between the plaintiff and the defendant Union Pacific Railroad Company, between the plaintiff and the defendant Chicago, Rock Island and Pacific Railroad Company, and between the plaintiff and the defendant Chicago and Northwestern Railway Company, and we object on those grounds.

Mr. Beckman: If it please the court, there are certain parts in there that this plaintiff would just as soon be in the evidence, but we must concede, as counsel for the Union Pacific has pointed out, an agreement entered into between these defendants can in no way change the legal duty imposed upon the defendants to this plaintiff. The obligations there cannot be modified or changed or altered in any way, and therefore, we feel that the Rules are completely [fol. 476] irrelevant and immaterial to plaintiff's case against these three defendants.

The Court: Well, the court will sustain plaintiff's objection, and likewise the objection of the Union Pacific. But that does not, I repeat, deprive the Rock Island at the time, should occasion arise, of presenting these matters.

Defendant Rock Island at this time offers in evidence in connection with the cross-examination of the plaintiff defendant Rock Island Exhibit No. 13.

No objections being made by counsel for other parties, defendant Rock Island Exhibit No. 13 was received in evidence.

Mr. Webster: Defendant Rock Island also offers defendant Rock Island Exhibit No. 6, a photograph of the car in question.

Mr. Beckman: To which plaintiff objects on the ground that there has been no proper and sufficient foundation laid for the admission of the picture, the picture showing in and of itself that it was taken on February 12, 1953, after the car had been removed from the Kansas Grain Company to some other location, or any showing that that is the exact car, the only witness testifying as to that particular picture stating that he merely took a picture of such objects as were pointed out to him by some other person, and the figures put thereon were also put on at the direction of the other person.

The Court: Was his testimony that he put these numerals on here at the direction of the person for whom he was taking the photograph?

Mr. Webster: I think it was, your honor, and we also showed him a picture of the car showing the car number on it and numerals on it. He testified relative to that, if you will recall, on redirect examination.

The Court: Well, this is taken on February 12th ap- [fol. 477] parently. I think I shall sustain the objection of the plaintiff. I don't believe that there will be a lack of photographs to aid the jury.

At this point, the jury was recalled and the following occurred in the presence of the jury:

Mr. Howland: Defendant Rock Island will rest at this time.

At this point, defendant Chicago & Northwestern Railway Company and Union Pacific Railroad Company rested without offering any evidence. Plaintiff offered no rebuttal.

(Whereupon, the jury was admonished by the court and excused until 2:00 p. m. on October 18, 1955).

The following proceedings were then had in the absence of the jury:

[fol. 478] (In the absence of the jury.)

Mr. Howland: At this time at the close of all the evidence, and all parties having rested, the defendant, Chicago, Rock Island and Pacific Railroad Company now moves the court to direct the jury in this case to return its verdict in favor of the defendant, and we renew and repeat each and all of the grounds of the motion interposed at the close of the evidence of the plaintiff, and in addition thereto we desire to add the following grounds of the motion for directed verdict to be considered as following some five or six enumerated grounds specified in our original motion, which is now renewed.

1. We move the court to direct a verdict for the defendant Chicago, Rock Island and Pacific Railroad Company because the evidence affirmatively shows that with respect to the movement of car R.I. 145287 no relationship of carrier and shipper existed at any time material between this defendant and the Kansas Grain Company, employer of plaintiff.

2. That the record shows that the defendant Union Pacific Railroad Company was and is the only defendant as to whom a relationship of shipper and carrier existed as between Kansas Grain Company, employer of the plaintiff, and the three railroad company defendants. Therefore, the defendant Union Pacific Railroad Company being the initial carrier of the car, and named as the only carrier of the car in the bill of lading issued, is the party legally responsible for the condition of the car at the time the injuries of plaintiff were suffered.

3. That the evidence affirmatively shows that the defendant Union Pacific Railroad Company voluntarily elect-
[fol. 479] ed to accept the car, and derived all of the

financial benefits from the use of said car, and that said defendant cannot divide responsibility for the condition of the car from the benefits of accepting the same and transporting the same and receiving revenue therefor.

4. That as a matter of law the record affirmatively shows that the car, R.I. 145287, at the time plaintiff suffered his injury, was legally in the possession of the defendant Union Pacific Railroad Company, and that defendant Union Pacific Railroad Company was the only party which can be required to respond to the plaintiff for the injuries sustained by him.

5. That the evidence of the parties is susceptible of but one final conclusion, to-wit: defendant Union Pacific Railroad Company by its acts and conduct, and by accepting billing on the car in question elected to have switching service performed for its account by the defendant Chicago, Rock Island and Pacific Railroad Company; and thereby necessarily assumed responsibility for the injury and damage which was sustained by plaintiff in this action.

In addition to the grounds just enumerated, we desire to add the following grounds of the motion:

That the evidence of all parties fails to show that the condition of the car was of such character that a reasonable inspection thereof would have disclosed to any of the defendants the existence of any condition constituting actionable negligence, and we desire to point out to the court that the plaintiff, an experienced car man himself, testified [fol. 480] that he made an examination both of the door of the car, the door track, the upper portion of the car and the underneath portion, and observed no defective condition.

We desire further to add to the motion that the evidence is insufficient as a matter of law to establish plaintiff's freedom from contributory negligence.

And as an additional ground, that the evidence of all parties does not disclose that the plaintiff has been damaged or injured as a result of any defect in the car which reasonable diligence or inspection would have disclosed.

We desire at this time, without enumerating them, to renew each and all of the motions made at the conclusion of the plaintiff's evidence with respect to the exclusion of the testimony of the witness, Doctor Blanchard, with respect to the so-called Kimmel's disease, and also with respect to the withdrawal from the jury of the specific allegations of negligence as pleaded by the plaintiff, and we renew the motion on each and every ground set forth in the motion made at the conclusion of plaintiff's evidence.

At this time, counsel for defendant Chicago & Northwestern Railway Company renewed the motion for a directed verdict previously made at the close of the plaintiff's evidence on each and every ground therein set forth.

Counsel for the defendant Union Pacific Railroad Company renewed his motion for a directed verdict, which had previously been made at the close of the plaintiff's evidence.

The Court: Very well. I don't believe it will be necessary for the court to hear from counsel for the several [fol. 481] defendants. I will deny the motions of each defendent and the additional motions presented on behalf of the Rock Island having to do with the testimony of Doctor Blanchard.

I recognize there is repetition in the grounds of negligence asserted by the plaintiff and in the instructions counsel will find we have very substantially abbreviated the grounds of negligence alleged. As to instructions which have been requested by various defendants and not incorporated in the instructions which have been submitted to counsel, they will be deemed overruled and exceptions thereto will be allowed."

[fol. 482] Defendant's Chicago, Rock Island and Pacific Railroad Company Requested Instructions.

(Presented to the court by counsel for Defendant Rock Island on October 17, 1955, and filed in U. S. District Court, October 19, 1955.)

[fol. 483] Comes now defendant Chicago, Rock Island & Pacific Railroad Company and within the time specified

by the court, requests the court, upon the trial of this action, to give to the jury the following requested instructions, numbered from one to seven, inclusive. By filing these requests for instructions at this time, defendant does so in compliance with the direction of the court and does not waive the right to question the sufficiency of the evidence to support a judgment against it on any issue.

[fol. 484] Requested Instruction No. 1.

You are instructed that one of the elements of plaintiff's cause of action, which he is required to establish by a preponderance of the evidence is that he was himself free from negligence contributing in any degree to bring about his own injury or the accident in which his injuries occurred. Unless plaintiff has established his own freedom from contributory negligence he cannot recover damages in this case.

[fol. 485] Requested Instruction No. 2

You are instructed that a person who has been injured through the negligent act of another, even though he is himself free from negligence, is under the legal duty and obligation to mitigate or minimize, to the extent reasonably possible, the damages which he has sustained. A person who suffers injury, through the negligence of another, which disables him from following his regular occupation is not entitled to remain idle, and demand that the person responsible for his injuries pay him for complete loss of time and wages, either temporary or permanent. It is his duty to seek employment which he can reasonably perform, and to exercise the care and prudence of a reasonably prudent man to procure work for which he is physically fitted. The burden of proof is upon plaintiff to show the extent of his damage and that he could not mitigate or lessen the amount thereof. If you find that plaintiff has been or will be reasonably able in the future to perform some work available to him, then plaintiff is entitled, in this action, to recover only the difference between what he was reasonably certain to have earned at the Kansas Elevator and the present worth of the amount which he has been, or will be, able to earn in the future.

[fol. 486] Requested Instruction No. 3

A railroad company is not responsible to the public generally for any injuries which may be sustained by persons working on or about its cars, unless there is a direct business relationship between the railroad and the person injured, or between the railroad and the employer of the injured person. The mere fact that defendant Chicago, Rock Island & Pacific Railroad Company owned car RI 145287 imposed no duty or obligation on the part of such defendant to the plaintiff in this action. Plaintiff cannot recover damages from defendant Rock Island Company merely because his employer had placed an order for empty freight cars for grain loading with that defendant. If the car, at the time plaintiff was injured, was being used and loaded for shipment over the line of the Union Pacific Railroad Company and the Rock Island Company did receive only a switching charge to be paid by Union Pacific Company for switching the car from the elevator to the line of Union Pacific Railroad, then the car was not being used in the business of defendant Rock Island, but in the business of defendant Union Pacific, and Rock Island would not be legally responsible for the condition of said car.

[fol. 487] Requested Instruction No. 4

The following facts are all undisputed and in your deliberations you must treat them as fully established and as true.

(a) Car RI 145287 was set at the usual place where grain cars for loading were customarily left by a switch crew of Chicago & Northwestern Railway Company, some time prior to midnight on February 9, 1953.

(b) Car RI 145287 was loaded with shelled corn at the elevator of Kansas Grain Company on the afternoon of February 10, 1953. Samples for inspection and grading by the Omaha Grain Exchange were taken from the car and sent to the Omaha Grain Exchange office in Omaha, Nebraska.

(c) Plaintiff was injured at about 4:15 P.M. on February 10, 1953.

(d) On the morning of February 11, 1953, the Omaha Grain Exchange inspectors graded the [sampl] as number 2 shelled corn and so advised the Kansas Grain Company office in Omaha, Nebraska; Kansas Grain Company prepared a bill of lading for shipment of said car from the elevator of Kansas Grain Company at Council Bluffs, Iowa to destination at Denver, Colorado, on the morning of February 11, 1953 and at about 10:45 A.M. on said date Union Pacific Railroad Company accepted the shipment and signed the bill of lading.

[fol. 488] Requested Instruction No. 5

You are instructed that when Union Pacific Railroad Company, on the morning of February 11, 1953, accepted the billing on car RI 145287 and signed the bill of lading it assumed all duties and obligations as a common carrier incident to said car and its condition and use by the elevator company up to that time, and that it thereby became responsible for the condition of said car RI 145287 to the same extent as though an order for said car had been placed directly with the Union Pacific Railroad Company and Union Pacific Railroad Company had delivered said car to the Chicago, Rock Island & Pacific Railroad Company or Chicago & Northwestern Railway Company with directions to set the same for grain loading at the Kansas Grain elevator in Council Bluffs, Iowa.

[fol. 489] Requested Instruction No. 6

A railroad company which accepts a car and signs a bill of lading therefor, from a shipper thereby legally assumes full responsibility for the condition of the car from the time that the loading of the car was commenced and the mere fact that it made no inspection or did not have physical possession of the car at any time prior to accepting the billing, in no way relieves it from its obligation to exercise care with respect to the condition of the car toward employees of the shipper of such car.

[fol. 490] Requested Instruction No. 7

Under the commissioner standard ordinary mortality tables it appears that the expectancy of life of a man 58

year of age is 15.77 years. Mortality tables are based upon the average expectancy of a large group of individuals in normal health, who have attained the age specified. The period of expectancy is merely a composite average of the length of time that such person may be, on the average, expected to live. The period of life expectancy does not apply to any particular individual since anyone is likely to die at any time, or may live to a greater age than is indicated by the expectancy tables.

The life expectancy of an indivdual has no relation whatever to the period in which such individual may be able to be gainfully employed so as to be capable of earning wages. The work expectancy of any individual can, obviously, not be mathematically determined, but in the event that you find that plaintiff in this case is entitled to recover damages from some one or more of the defendants, you will determine from the evidence and from your knowledge generally, the period of time that the plaintiff can reasonably be expected to be gainfully employed, taking into consideration his past and present state of health, his age, his past and present earning capacity, the probability of illness,, injuries or death at any time, possibility or probability of retirement; and all other factors bearing thereon as shown by the evidence. Based thereon you may, if you find plaintiff entitled to recover damages, award him such sum as being presently paid, or as the result of this law suit will constitute compensation for any future loss of earnings which plaintiff may sustain.

[fol. 491] At approximately 1:10 p. m. on October 18, 1955, in the absence of the Jury the court presented to counsel for all parties a draft of instructions in writing to be given to the jury, and advised counsel that exceptions to the instructions should be taken before the same were read to the jury. Whereupon, the following proceedings were had:

Mr. Howland: For the record, I desire to object and except to the instructions as presented by the court to

counsel, for each and all of the following reasons, and in the following respects:

First, the defendant Rock Island desires to object to all of the instructions for the reason that nowhere in the instructions is the jury informed that the defendant Union Pacific by actually accepting the car and issuing billing thereon in which it is named as the sole carrier, necessarily assumes any responsibility either for itself or jointly with the defendant Rock Island for the condition of car R. I. [fol. 492] 145287. That rule of law is enumerated and is found in one of our requested instructions, and I believe is a correct statement of the law, and I am unable to find it anywhere among the instructions as presented by the court. We believe that the omission of such an instruction in view of the request which was given, is prejudicial to the defendant Rock Island.

Now, taking up the instructions, in the order in which they are presented, we desire to except and object to Instruction No. 1, and particularly to the paragraph appearing at the top of page 3 of the instruction No. 1 wherein the allegations of plaintiff's complaint with respect to the extent of the injuries sustained by plaintiff are set forth, being the paragraph beginning "for all of which plaintiff asks judgment at your hands against the defendants, either singly or jointly, in the amount of $107,712.55." The reason for the exception being that the instruction unduly emphasizes the extent of the plaintiff's injuries; that it constitutes a magnification and repetition of the claims of the plaintiff necessary to a fair statement, and therefore prejudicial to this defendant.

With respect to the statement of the court appearing in the paragraph beginning: "Defendant Union Pacific by its answer alleges among other things * * *", we desire to object and except for the reason that it was heretofore stated with respect to the objections and exceptions to all of the instructions, namely, that the setting forth of the date of the execution of the bill of lading as being on the day subsequent to the occurrence of the injury has a definite [fol. 493] tendency to lead the jury to believe that the de-

fendant Union Pacific would not or could not under the law be responsible for the condition of the car either of itself or jointly with the defendant Rock Island, and in that respect said statement of the pleading of the defendant Union Pacific is erroneous and prejudicial to the defendant Rock Island.

To the giving of Instruction No. 3, the defendant Rock Island objects and excepts to the whole of said instruction as unnecessary, and under the present record there being no evidence before the jury, we believe that the same could and should be written from the jury's consideration.

To Instruction No. 5, defendant Rock Island excepts and objects because said instruction is a mere abstract statement of the law of contributory negligence without making the same in any manner applicable to the duties or obligations of the plaintiff to exercise care for his own safety in the performance of his work for Kansas Grain Company. That while the same is abstractly a correct statement of the law, it does not adequately set forth the obligation of plaintiff.

The subdivision (d) of Instruction No. 6 we object and except unless there be coupled with the instruction as prepared a statement as to the effect of the billing and acceptance of car R. I. 145287 by defendant Union Pacific on the morning of February 11th, and again we refer to the omission of the court to give our requested instruction, and to the omission in all of the instructions to tell the jury that defendant Union Pacific under the law may not accept a car [fol. 494] for billing and receive therefrom the revenues for transportation without also at the same time assuming the obligations incident to the common carrier relationship towards such car."

With respect to Instruction No. 8, the defendant Rock Island objects and excepts for each and all of the following reasons, to-wit:

We except to the specification of negligence in the language set forth in number one beginning "In failing to exercise ordinary care in inspecting car * * *" for the

reason that the duty of inspection of a car arises only out of the shipper—carrier relationship, a relationship which is entirely absent so far as the defendant Rock Island is concerned in the present record; that the specification is a mere generalization and is not a specification of any act or omission on the part of the defendant Rock Island.

To specification number two embodied in Instruction No. 8, we object on all of the grounds set forth with respect to specification number one; and further, we object and except for the reason that nowhere in said specification number two or elsewhere is there any proper allegation of negligence. The specification in effect makes the defendant Rock Island as well as the other defendants insurers of the safety of the equipment.

With respect to the specification designated as number three—"In failing to furnish the shipper, Kansas Grain Company, * * *", this is objected and excepted to by the Rock Island because it is not a proper allegation of negligence, because the same would in effect make the defendant [fol. 495] the insurer of the safety of the cars so furnished, and because it is a mere catch-all specification that means no more than that the defendant was negligent with respect to said car, and not a proper specification for submission to the jury.

Now, again we desire to point out with respect to Instruction No. 8, and to except thereto for all of the reasons pointed out with respect to our exceptions to all of the instructions, namely, that nowhere in the instructions or in this instruction is the jury adequately or properly informed as to the duty or obligation of the defendant Union Pacific in accepting a car for loading, and the fact that by so doing the defendant Union Pacific necessarily assumed the obligation of a carrier with respect to said car, and that said duty not only extended from the time of said execution of the bill of lading, but also extended to the furnishing of the car, which is inherent in its acceptance by the defendant Union Pacific.

With respect to Instruction No. 10, we object and except because said instruction No. 10 appears to conflict with In-

struction No. 8 which sets forth the specifications submitted. We except particularly to the paragraph beginning "The obligation or duty on the part of a railroad company in furnishing a car * * *", for the reason that said paragraph improperly states the duty of defendant. Again, it omits to tell the jury as to the obligation arising on the part of the Union Pacific Railroad Company out of the voluntary acceptance and taking of the car and use in its business as shown in this record. We believe that the [fol. 496] second paragraph of Instruction No. 10 beginning "Employees or persons rightfully engaged in closing the door of a railroad box car are regarded as invitees * * *", is an incorrect statement of the law with respect to individuals; that the duty arises as an incident to the shipper-carrier relationship, and that there is a total absence in this record of any evidence or condition which would in any event make plaintiff stand as an invitee of the defendant Rock Island.

With respect to Instruction No. 10½, we make the same objections, and object on the same grounds as set forth with respect to Instruction No. 10.

With respect to Instruction No. 13, we believe that the instruction embodies some portions of the defendant's re- [fol. 497] quested instruction No. 7, but we desire to except Instruction No. 13 insofar as it omits to tell the jury as to some of the matters set forth in our requested instruction No. 7. For instance, upon request we think it the duty of the court to inform the jury that life expectancy and work expectancy are not identical, and that the mere fact that the expectancy of life of plaintiff may be measured by the mortality tables does not indicate that plaintiff will be employable for that period of time.

We further object to the omission of the court to give the substance of requested instruction No. 7, and point out that therein there is embodied the statement that it is the duty of the jury to determine the period of time that the plaintiff can reasonably be expected to be employed or employable in the future, and for all of these reasons we desire to except to the refusal of requested instruction No. 7 as well as to the giving of Instruction No. 13 without the in-

clusion of the elements which are embodied in our requested instruction No. 7.

The Court: You have an automatic exception to that.

Mr. Howland: To Instruction No. 17 and to the manner and method of submission of the case to the jury and to the forms of verdict submitted for consideration by the jury, the defendant Rock Island desires to object and except for each and all of the following reasons:

1. That there is submitted one form of verdict under which the jury is authorized to find a verdict in favor of the plaintiff and against defendant Rock Island only. For the reasons heretofore pointed out we believe that the defend- [fol. 498] ant Union Pacific, having under the undisputed evidence in this record, accepted the car, cannot avoid either sole responsibility or responsibility jointly with the defendant Rock Island for the condition of said car, and we believe and we suggest to the court that the submission of a form of verdict permitting the jury to find solely against the Rock Island and against no other defendant would be erroneous and prejudicial to this defendant.

In addition, there is no form of verdict submitted with the instructions of the court which permits the jury to find in favor of the plaintiff and against any two of the defendants. The objection at this point is predicated upon the fact that under the record it is obvious that there cannot be a furnishing of an empty car in and of itself as distinguished from the movement of the loaded car; that since it is undisputed that the defendant Union Pacific Railroad Company procured the billing upon this car in question, there is no basis for a submission of the case unless there be a submission including a form of verdict in which the defendant Union Pacific is found to be either individually or jointly liable with one or more other defendants."

After discussion between the court and counsel of the exceptions, the court indicated an intention to redraft Instruction No. 11 as presented, which was done, and the redrafted instruction presented to counsel for all parties who took no further exception thereto.

The Court: As to the other exceptions that have been taken to the instructions, the court will overrule them, and as I told you before, the court overrules all requests for instructions, or denies them, excepting as they may have been incorporated in these instructions.

There was left hanging a thread that we have all over-[fol. 499] looked, I think, and it was called to my attention by the Clerk, and that was that I reserved my ruling as to the motion to strike Count II.

I considered that I had withdrawn Count II, and have treated it so in the drafting of these instructions, and otherwise, and that there may be no doubt in the record, Count II is treated as withdrawn.

Mr. Anderson: I really haven't had time to give that last remark very much thought, but it occurs to me that if Count II is withdrawn, then any instruction that submits a joint verdict would be improper as not being placed on any proceeding now before the court.

The Court: Well, you may, if you desire, make an exception to it. Count I charges the defendants both singly and jointly with their negligence as specified. Count II charges concurrent negligence. There is no instruction as to concurrent negligence, and I believe the verdicts are in such form that a verdict may be returned against one, two, or all three defendants. Because you see, you have got to assume ordinary intelligence on the part of a jury, and if the jury decided to return a verdict against the Rock Island and the Northwestern, it could so indicate in the verdict that it returns. If it eliminates the Union Pacific, its verdict would so indicate.

If you have anything further as to Count II, I will be glad to hear it, Mr. Anderson. Otherwise, I will call my jury and proceed with the arguments.

Mr. Anderson: Well, I will withdraw the comment that I made.

At 4:20 p.m., October 18, 1955, the jury was called into the court room and opening arguments were presented to the jury by counsel for plaintiff and for defendant

C.R.I.&P.R.R. Co. Court adjourned at 5:30 p.m. October 18, 1955 until 9:15 a.m. October 19, 1955, at which time coun-
[fol. 500] sel for defendants Chicago & Northwestern and Union Pacific Railroads concluded their arguments to the jury, followed by the closing argument of counsel for plaintiff. The instructions of the court were read to the jury by Judge Riley's law clerk.

[fol. 501] Court's Instructions To Jury.

(given by the court to the jury October 19, 1955 and filed in U. S. District Court, October 19, 1955.)

[fol. 502] Instructions to Jury.

United States District Court
Southern District Of Iowa
Western Division

W. E. Williams, Plaintiff,
No. 1-196. vs. Civil.
Chicago, Rock Island & Pacific Railroad Company, a corporation; Chicago & Northwestern Railway Company, a corporation; and Union Pacific Railroad Company, a corporation, Defendants.

Members Of The Jury:

Instruction No. 1.

Plaintiff, W. E. Williams, for his cause of action against the defendants above named, states in his written complaint or pleading filed in these proceedings, that he is a resident and citizen of Council Bluffs, Iowa, and that the defendants are nonresidents of the State of Iowa, being railroad companies incorporated in the States of Illinois, Wisconsin and Nebraska, respectively, but authorized to do business in Iowa.

Plaintiff alleges in his complaint that on February 10, 1953, he was employed by the Kansas Grain Company at its elevator located at 30th Street and 1st Avenue in the City of Council Bluffs, Iowa, and that in the course of his

employment he was sent to a side track of the Kansas Grain Company to close the door on Rock Island box car No. 145287 after it had been loaded with grain from the said elevator; [fol. 503] that while he was endeavoring to close the door on said car No. 145287, said door fell upon the plaintiff, W. E. Williams, and severely injured him.

Plaintiff further alleges that he is informed and believes that on or about the 9th or 10th days of February, 1953, defendant Chicago, Rock Island & Pacific Railroad Company on order from the said Kansas Grain Company sent certain freight box cars, including Rock Island car No. 145287 mentioned above, to the railroad side track of the Kansas Grain Company to be loaded with grain by said company, being plaintiff's employer; that the Chicago & Northwestern Railway Company switched, spotted and placed said Rock Island car No. 145287 on the side track for use by the Kansas Grain Company; and that said car No. 145287 was designated for shipment to Denver, Colorado, via the Union Pacific Railroad Company, which latter railroad was to be the initial carrier of said car No. 145287 after it was loaded.

Plaintiff alleges and charges that the door of Rock Island car No. 145287 fell upon and severely injured him as aforesaid because of the negligence of each of said defendant railroads, which particulars or specifications of negligence are set forth and referred to in following Instruction No. 8; and plaintiff charges in his complaint that such alleged negligence on the part of the three defendants was not only the separate negligence of each of them, but that it was as well their joint negligence, and that such negligence was the proximate cause of his injuries and damage. Plaintiff claims that he on his part was not guilty of any negligence that contributed to his injuries and damages.

[fol. 504] Plaintiff further alleges that by reason of the negligent acts of the defendants he was crushed beneath the falling steel door at the time and place mentioned, and sustained severe and painful injuries consisting of lacerations on his body, fractures of the vertebrae of his back, a broken right leg and loss of upper and lower teeth; that he was immobilized and placed in a body cast for more than

three months and that his right leg was in cast for more than five months, necessitating great hospital and medical expense therefor; that he was totally disabled from February 10, 1953, until June 30, 1954, that he suffered the loss of earnings to a substantial amount during that period, and since that time he has been unable to obtain gainful employment due to the general weakness of his body and will sustain loss of earnings in the future; that he has sustained permanent disability in his spine, and that he walks with a right limp; and that as a result of said injuries plaintiff sustained great physical and mental pain and anguish and will sustain such pain and suffering in the future; for all of which plaintiff asks judgment at your hands against the defendants, either singly or jointly, in the amount of $107,712.55.

Defendants for answer to the complaint and alleged cause of action by the plaintiff against them, separately admit by their written pleading herein their respective corporate character, which defendants will be referred to hereafter as the Rock Island (or RI), the NW and the UP; admit that on or about February 10, 1953, plaintiff was employed by the Kansas Grain Company at its grain elevator located at 30th Street and 1st Avenue in the City of [fol. 505] Council Bluffs, Iowa, and that on or about the 9th day of February, 1953, defendant Rock Island was the owner of box car R.I. No. 145287.

Defendants Rock Island and North Western admit that there is an agreement between them with respect to the maintenance and operation of the trackage known as the River Track in Council Bluffs, Iowa, and defendant North Western admits that it switched, spotted and placed R.I. car No. 145287 on the side track for use by the Kansas Grain Company on or about the time in question.

Defendant Union Pacific by its answer alleges among other things that on or about February 9, 1953, box car R.I. No. 145287 was set out on the connecting track in Council Bluffs, Iowa, by a switch crew of the Rock Island, and that a switch crew of the North Western delivered the same to the Kansas Grain Company for the purpose of being loaded with grain; that after the car was loaded and

in the afternoon of February 10, 1953, a sample of the grain was taken from the said car for the purpose of having it graded; that upon the sample being taken, the employees of the Kansas Grain Company started to close the door of car No. 145287, when plaintiff, W. E. Williams, was injured; that on the day following the accident the employees of the Kansas Grain Company determined the destination and routing of said car to be Denver, Colorado, and bill of lading was received by the Union Pacific on such date for shipment over its lines.

But each defendant railroad specifically denies the allega-
[fol. 506] tions of negligence separately charged against each of them, or that such alleged negligence was the proximate cause of the alleged injuries suffered by Mr. Williams, denies the claim of plaintiff that he did not on his own part contribute to the alleged accident and resultant injuries, and denies the claim of plaintiff for damages as aforesaid and asks that the complaint of plaintiff be dismissed.

[fol. 507] Instruction No. 2.

The foregoing statements are the claims of the parties to this suit as made by them in their written pleadings filed in this cause, but such statements and claims are not evidence and should not be considered by you as evidence.

Whether or not the claims of the parties have been sustained by the evidence is for you to say and determine under all the facts and circumstances disclosed by the evidence presented at the trial and as you are guided by these instructions as to the law.

[fol. 508] Instruction No. 3.

On behalf of each of the defendants, further written pleadings have been filed by them in this cause, which have been referred to during the course of this trial as "cross claims." Such cross claims are alleged separate causes which each defendant is asserting against the other two co-defendants, as follows:

The Rock Island against the Northwestern and the Union Pacific:

The Northwestern against the Rock Island and the Union Pacific; and

The Union Pacific against the Rock Island and the Northwestern;

on the ground that if one of such named defendants should be found liable for the injuries suffered by plaintiff herein, W. E. Williams, in the main case, that the liability, if so found, would be a secondary liability, and that the primary or main liability in such event should be found to be against the other co-defendants. In other words, it is the claim of each defendant that if it were so found to be liable to the plaintiff, it should have a recovery over against the other two co-defendants. However, this is not a matter to be considered or determined by you because final determination on the issues raised by such cross claims will be made, if it should become necessary to so determine, by the court. You as the jury are the sole judge of the facts in this case on the issues raised as between the plaintiff and the three defendants. The matters raised by the three defendants among thmselves by the said cross claims are not [fol. 509] for consideration or determination by you, but will remain for later determination by the court after you have arrived at your verdict or verdicts on the fact issues herein between the plaintiff, W. E. Williams, and the three defendants.

[fol. 510] Instruction No. 3½.

I want to make it clear to you that it is the desire of the court to make clear to this jury that it is not to be considered by you that you must return a verdict against all defendants if you find for the plaintiff against one of them. You may return a verdict against any single defendant if you so find, or against all defendants if that is your verdict. That determination will be made solely by you as jurors as to whether you will return a verdict against one or more defendants as the case may be.

[fol. 511] Instruction No. 4.

You are instructed that plaintiff W. E. Williams bases his claims against the three defendant railroad companies upon what is known in the law as "negligence."

"Negligence" is defined as the want or omission of ordinary care; it is the doing of some act which under all the circumstances a reasonably prudent person would not have done, or the omission to do some act which a reasonably prudent person under the same or similar circumstances would not have omitted to do.

By "ordinary care" is meant that degree of care that an ordinarily cautions and prudent person, in a like situation is generally accustomed to use and employ to preserve or protect himself or others from injury; and it implies and demands the use of such watchfulness and precaution as, under the circumstances of each particular case, is fairly commensurate with the danger to be avoided when measured by the standard of common prudence and experience.

By "proximate cause" is meant the moving or producing cause. Negligence is the proximate cause of an injury which follows such negligent act, if it can be fairly said that in the absence of such alleged negligence, the injury and damage complained of would not have occurred.

By "burden of proof" is meant the obligation resting upon a party to prove the truth of the allegations made by him that are denied by his opponents.

[fol. 512] Instruction No. 5

By "contributory negligence" is meant such negligence or want of ordinary or reasonable care on the part of the person injured which contributed in any way or in any degree directly to the injury and damage in question. Contributory negligence may consist of voluntary exposure by a person to danger, or in his failure to avoid danger when the danger was known to him or when by the exercise of reasonable care and prudence on his part he could have discovered the danger in time to have avoided injury therefrom.

It follows from this that although the defendants or one or more of them may have been guilty of negligence at the time and place in question, yet, if the plaintiff through his

own negligence contributed to his injury and damage, if any, plaintiff cannot recover.

[fol. 513] Instruction No. 6

The following facts are all undisputed and in your deliberations you must treat them as fully established and as true:

(a) That cars were ordered by Kansas Grain Company for grain loading from the Rock Island RR. Co. in Council Bluffs, Iowa, and car No. 145287, among others, was placed on the connecting track by the Rock Island RR. Co., and thereafter said car was set at the usual place where grain cars for loading were customarily left by a switch crew of North Western Ry. Co., some time prior to midnight on on February 9, 1953.

(b) Car RI No. 145287 was loaded with shelled corn at the elevator of Kansas Grain Co. in the afternoon of February 10, 1953. Samples for inspection and grading by the Omaha Grain Exchange were taken from the car and sent to the Omaha Grain Exchange office.

(c) Plaintiff was injured at about 4:15 p.m. on February 10, 1953.

(d) On the morning of February 11, 1953, the Omaha Grain Exchange inspectors graded the sample as number 2 shelled corn and so advised the Kansas Grain Co. office in Omaha, Nebraska; Kansas Grain Co. prepared a bill of lading for shipment of said car from the elevator of Kansas Grain Co. at Council Bluffs, Iowa, to destination at Denver, Colorado, on the morning of February 11, 1953, and at about 10:45 a.m. on said date Union Pacific RR. Co. accepted the shipment and signed the bill of lading.

[fol. 514] Instruction No. 7

The fact that plaintiff was injured on Feb. 10, 1953, being admitted by all defendants, the burden of proof is upon the plaintiff to prove and establish to your satisfaction the following material allegations or propositions of his complaint by a preponderance of the evidence:

1. That the defendants, either singly or jointly, at and immediately prior to the time that the door of the car in question fell upon him, were negligent in one or more of the particulars or grounds of negligence alleged by plaintiff and set forth in Instruction No. 6.

2. That such negligence on the part of one or more of the defendants was the direct or proximate cause of the car door falling upon him at the time and place in question and of the resultant injuries to him.

3. That the plaintiff, W. E. Williams, at and immediately prior to the time of the falling of the door in question, was free from any negligence on his part which in any manner or to any degree directly contributed to the said occurrence.

4. That plaintiff sustained injuries and damages in some amount.

If the plaintiff has by a preponderance of the evidence in this cause established each and all of the four foregoing material allegations or propositions of his complaint, [fol. 515] he would be entitled to a verdict in some amount at your hands; but if the plaintiff has failed to so establish any one or more of the four foregoing material allegations or propositions by a preponderance of the evidence in his favor, then he cannot recover; and if you so find, it would become your duty to return your verdict for a defendant or defendants as the facts should warrant.

[fol. 516] Instruction No. 8

The grounds or particulars of negligence alleged by plaintiff in his complaint against each of the three defendant railroad companies are identical and are submitted to you by the court as follows:

1) In failing to exercise ordinary care in inspecting car R.I. 145287 and to have it in such condition that it might be used with reasonable safety.

2) In failing to have the door and track mechanism of Rock Island car #145287 in a proper state of repair at the

time of delivery of said car to the Kansas Grain Company, plaintiff's employer.

3) In failing to furnish the shipper, Kansas Grain Company, with a box car in such condition that it could be used for grain loading by plaintiff in closing the door of same with reasonable safety at the time in question.

It may be stated that plaintiff has set forth in his complaint several more grounds or particulars of negligence which the court considers are more or less repetitious, and that the court deems the issue of negligence between the parties to this suit to be fully contained in the three above alleged grounds or particulars thereof.

[fol. 517] Instruction No. 9

You are instructed that the mere fact that plaintiff, W. E. Williams was injured by the door of car No. 145287 falling upon him at and about the time complained of, to wit, 4:15 p.m. on February 10, 1953, does not raise any presumption of negligence on the part of the defendants or any of them.

Negligence, if any, will not be presumed against any defendant from the fact that injuries were sustained by plaintiff, but negligence must be proven by a preponderance of the evidence and the burden of proof in this respect rests upon the plaintiff.

In determining whether or not the defendants or one or more of them were negligent, you will consider only such negligence, if any, as is charged by plaintiff against the defendants and as set forth in preceding Instruction No. 8, and then only such negligence, if any, as was the proximate cause of the injury to plaintiff.

[fol 518] Instruction No. 9½

At the time the plaintiff filed his complaint against the defendants in this case he named them in the following order: Chicago, Rock Island & Pacific Railroad Co., Chicago & North Western Railroad Co., and Union Pacific Railroad Co. Because the defendants were named in that order the

court has directed that they be heard in that order throughout this case both as to presentation of evidence and arguments.

This fact is not meant to imply that the court considers any one of the defendants more responsible to the plaintiff than the others; nor should you consider the order in which the defendants appeared and argued as having any bearing on the case.

[fol. 519] Instruction No. 10

You are instructed that it is the law that a railroad owes to the shipper such as the Kansas Grain Company, who is to use a car for loading and shipping grain, the duty to exercise ordinary care to see that the car is in such state of repair that the employees of the shipper, while exercising ordinary care themselves, can enter upon and work about such car with reasonable safety for the purpose of closing the door thereof in connection with the loading of the car.

Employees or persons rightfully engaged in closing the door of a railroad box car are regarded as invitees toward whom the railroads owe a duty, to exercise ordinary care to see that such car is in a reasonably safe condition for the purposes intended.

The obligation or duty on the part of a railroad company in furnishing a car to a shipper to see that such car is in a proper state of repair contemplates that the railroad company prior to so furnishing the car will have exercised reasonable or ordinary care in making an inspection thereof.

[fol. 520] Instruction No. 10½

If in this case therefore you find that the plaintiff W. E. Williams has proved by a preponderance of the evidence in this cause one or more of the particulars or grounds of negligence as alleged by him and set forth in Instruction No. 8, then you will find the defendants, or one or more of them as the case may be, to have been negligent; and

if you further find that the injuries to the plaintiff would not otherwise have happened, then such negligence would be the proximate cause of such injuries; and if you further find that plaintiff did not contribute in any degree or in any manner directly to the falling of the door in question, then in such event he would be entitled to recover herein.

On the other hand, if plaintiff has failed to [extablish] the particulars or grounds of negligence set forth in Instruction No. 8, or that the negliegnce, if any, on the part of the defendants, or any of them, was the proximate cause of his injuries, or that he has failed to establish that he was free from negligence on his part which in any degree or in any manner directly contributed to the accident in question, then the plaintiff cannot recover and your verdict in such event should be for the defendants.

[fol. 521] Instruction No. 11

If, after a full and fair consideration of all of the facts and circumstances as disclosed by the evidence in this case, you find by a preponderance thereof that plaintiff, W. E. Williams, is entitled to recover from the defendants or one or more of them, then you should proceed to determine the amount of his recovery.

In determining what amount, if any, the plaintiff is entitled to recover from the defendants or one or more of them, you will take into consideration all of the evidence concerning the alleged damages which plaintiff claims he has suffered in respect to the following items, to wit:

1. Such amount as will fully and fairly compensate plaintiff for physical and mental pain and suffering which he has heretofore endured. There has been evidence in this connection to the effect that plaintiff has sustained permanent injuries. If you find plaintiff has sustained permanent injuries you may consider the present worth of the pain and suffering which he will with reasonable certainly sustain in the future.

2. Such amount as you find will fully and fairly compensate plaintiff for loss of earnings, if any, occasioned by his

injuries, and the present worth of that which he will with reasonable certainly suffer in the future because of any permanent injuries you may find he sustained as a result of the accident occuring on February 10, 1953.

3. Such amount as you find will fully and fairly compensate plaintiff for doctor, hospital, nursing expenses incurred.

[fol. 522] (In this connection the parties have agreed that if qualified witnesses were called at this trial, they would testify that the reasonable cost for such items as were occasioned to plaintiff from February 10, 1953, to the present time were $1,792.95 (being the sum of $634.00 for medical, $1,158.95 for hospital and nursing, etc.)

The aggregate of the above items which you may find established by a preponderance of the evidence, will constitute the amount of your verdict, which in no event shall exceed the total sum of $107,712.55. This sum is stated to you, not as an indication on the part of the court that this or any other sum should be allowed to the plaintiff; but is simply stating the amount which plaintiff claims he has suffered in damages and therefore limits the amount of your verdict.

By "present worth" as used in this instruction is meant such amount as being paid presently or as a result of this suit, you find by an impartial estimate, will afford just and reasonable compensation to the plaintiff.

In determining what, if anything, plaintiff should recover for physical and mental pain and suffering, permanent injuries, past, present and future, the court is unable to give you any definite rule by which you can measure his damages in these respects. Such estimate or approximation is left to your sound, considered judgment.

[fol. 523] Instruction No. 12

You are instructed that in arriving at your verdict, if you should find for the plaintiff under the evidence and guided by these instructions, you cannot bring in a so-called "quotient verdict." A quotient verdict is one where the jury

agree that each should write on his or her ballot an amount representing his or her judgment, that the aggregate of such figures should be divided by twelve, and that they will be bound by that result as their verdict. Such an amount or verdict so arrived at would be unlawful.

[fol. 524] Instruction No. 13.

Under the commissioner standard ordinary mortality tables admitted as evidence in this cause, it appears that the expectancy of life of a man 58 years of age is 15.77 years. Mortality tables are based upon the average expectancy of a large group of individuals in normal health, who have attained the age specified. In no event is this evidence conclusive on how long a person will live.

In considering the life expectancy of the plaintiff you will take into consideration all of the facts and circumstances in this case, including the condition of the plaintiff's health prior to the injury, the extent of the injury which he has sustained, the condition of his health after the accident, the condition of his health at the present time, and any other matter shown by the evidence which may have any bearing upon the question.

[fol. 525] Instruction No. 14.

The court has not attempted or intended to embody in any one instruction all of the law applicable to the case. You are to consider and construe all of the instructions together and apply them as a whole to the evidence in the case.

No language used by the court in these instructions, and no statements, remarks, or rulings made by the court during the progress of this trial should be considered by you to mean that the court entertains any opinion in relation to any of the facts in the case or what your verdict should be.

It is the duty of the court to determine the law and to determine what evidence is admissible for your consideration, and you will disregard all evidence excluded or stricken from the record during the progress of the trial, and you

must give the same no consideration whatsoever in arriving at your verdict.

[fol. 526] Instruction No. 15.

In this case expert or opinion testimony has been introduced. This expert or opinion evidence is appropriate when the subject matter of the inquiry is such that, without such assistance, inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, or when it so far partakes of the nature of a science or to require a course of previous study, habit or experience to attain a knowledge of it; but it is not appropriate when the subject matter of the inquiry is not of such a nature as to require a peculiar study, habit or experience to qualify a person to understand it.

It is for you to say how much weight shall be given to such testimony in this case, and it is proper for you to consider it and give to it such weight, when fully and fairly considered by you, as you may think it justly entitled to receive, considering the amount of skill and knowledge, experience, observation and opportunity for observation each of such witnesses has had to qualify him to give expert or opinion testimony as to such matters.

[fol. 527] Instruction No. 16.

These instructions must govern you as to the law of the case. You, however, are the sole judges of the facts in this case, as well as of the credibility of the witnesses, the weight to be given their testimony and the conclusions to be drawn from the facts and circumstances proved or established. In determining the weight to be given the testimony of the several witnesses, you may consider among other things, the nature and extent of their interest, if any, in the result of the suit; their bias and prejudice or their fairness and candor, as shown by their testimony; their intelligence or the want of it; their opportunities of seeing and hearing the facts testified to by them; their demeanor on the witness stand; the reasonableness or the unreasonableness of their testimony; and all the other facts and

circumstances shown by the evidence which may throw light upon the case.

It is your duty to endeavor to reconcile the testimony of all the witnesses upon the theory that they have testified truthfully, if you can do so, and you should not arbitrarily reject the testimony of any witness for light and trifling reasons; but if you are unable to harmonize the evidence upon this theory, then you will determine for yourselves what witnesses you will believe and what you will not believe.

You should carefully examine, compare and consider the proofs which tend to support the claims of the respective [fol. 528] parties, reason upon the same as men and women of intelligence and common sense, and laying aside all bias and prejudice for or against either party, determine this case solely upon the evidence and under the rules of law as given you in these instructions.

[fol. 529] Instruction No. 17.

Herewith you will find four sheets of paper containing suggested forms for your verdict or verdicts.

If by a preponderance of the evidence you find that the plaintiff has sustained the burden of proof herein as against the defendants, or one or more of them, you will use the form of verdict which accords with your finding in this respect. If you find that plaintiff has failed to sustain the burden of proof, your verdict will be in favor of the defendants or defendant for whom you so find, and you will use the form of verdict which accords with your finding in this respect.

The court hands you four sheets of paper containing the forms above suggested as to each defendant separately or jointly.

When you have agreed upon your verdict or verdicts you will have the same signed by one of your members whom you shall have chosen as foreman, and return the said ver-

dict or verdicts into court, together with the exhibits and these instructions.

Signed at Council Bluffs, Iowa, this 19th day of October, 1955.

WILLIAM F. RILEY,
United States District Judge.

[fol. 530] (During the reading of the instructions, the court gave an oral instruction which was denominated No. 3½. Said Instruction No. 3½ was later incorporated in typewritten form in the set of instructions given to the jury. Counsel for the defendant Rock Island Railroad made the following record pertaining to said instruction:)

Mr. Webster: The defendant Rock Island excepts to the oral Instruction No. 3½ on the ground that it unduly emphasizes the possibility of returning a verdict for the plaintiff, and on the further ground that it does not instruct the jury that they could return a verdict for any two of the three defendants.

The jury retired from the court room to commence its deliberation at 11:35 a.m., October 19, 1955, and returned into court at 4:20 p.m. with the following:

"Verdict

"We, the jury find in favor of plaintiff and against defendant Chicago, Rock Island and Pacific Railroad Company, and assess the amount of his recovery at $42,890.27."

This was the only verdict returned by the jury and the other forms of verdict incorporated in the instructions were not used, signed or any amounts filled in with respect thereto. Thereupon, the jury was excused and the court directed the clerk to file and record the verdict.

Thereupon, the following proceedings were had:

[fol. 531] The Court: Is there any record of any kind?

Mr. Howland: Yes, if the court please. I would like to request the entry of an order extending the time for filing of motions for new trial, motion notwithstanding the verdict, and motion to set aside the verdict, and in view of the situation which confronts us, I would like an opportunity while counsel are present to get the views of the court as to the situation in which we are now left in view of this verdict, and about when the court would take up the further hearing to which reference was made during the trial of the case, and I don't know whether Mr. Beckman is interested in that phase of the matter or not. I would like to suggest that we be given thirty days' time in which to file these motions, and of course that is the only thing that is important at this stage of the proceeding.

The Court: Well, the court will grant to the defendant Rock Island thirty days' time in which to file any motions it may desire to file. So far as the other matters that you mentioned may be concerned as to fixing a time, I can't tell until I see what—

Mr. Howland: Well, manifestly, as long as we have time for filing the motions, as long as the whole matter is pending, why we are not in any particular difficulty, but there may well be some additional record which the plaintiff's counsel may desire to make. I think our position is preserved in the present status with the allowance of the time for filing our motions.

The Court: Very well, that will be granted.

Mr. Kistle: It occurs to us that this is a situation in which the other two forms of verdict were not used by the jury at all. That is to say—

[fol. 532] The Court: A sole verdict was returned against the defendant Rock Island Railroad.

Mr. Kistle: Yes. And we take it that that is a verdict in favor of the Union Pacific and the Chicago, Northwestern.

The Court: I would so interpret it, that no verdict was returned against either of those roads despite the instruc-

tions of the court. I could recall the jury and have them, if they are still within the sound of your voice, and have them sign, but I don't consider it necessary in view of the fact that no verdict has been returned against any except the Rock Island, and I think that is consistent with the instructions of the court.

Mr. Kistle: I think it is implicit in them.

The Court: I think it necessarily inheres.

Mr. Howland: May I inquire by that statement if your honor means that—says that this disposes of the matters arising with respect to the cross claims as well?

The Court: I still consider that you are at liberty to make any such motions as you may desire I make no restrictions on any motions you may file. That is for your determination.

Mr. Howland: Well, the question that I had in mind was whether the court desired at this time to state as to the effect of this verdict upon any cross claims. If the court doesn't wish to make any statement, of course I have no—

The Court: Well, I don't care to make any statement at this time until I see what record, if any, you may make.

Mr. Howland: Thank you, your Honor.

The Court: Then I will be very glad to have you make a record, sir.

[fol. 533] Mr. Davis: Your honor, I am not pressing you for anything, but there do remain undisposed of motions of the Chicago, Northwestern and the Union Pacific to dismiss the cross claims of the Rock Island against each of those defendants. Now, I think this verdict disposes of those except for formal ruling by the court, but they do remain undisposed of.

The Court: Well, the right is given to renew those claims, if you desire to do so.

Mr. Davis: Well, the motions were made—if the court recalls, we moved to dismiss the counterclaim of the Rock Island against us. The U. P. made a similar motion. The court, as I understood it, reserved ruling on those at the time they were made. In other words, they never have been ruled on either way, and perhaps because of the verdict of the jury, if the court were to present a formal ruling—in the event the Rock Island cares to take exceptions to that—

Mr. Howland: Well we certainly would take exception to any ruling which would have the effect of releasing or taking the Chicago, Northwestern and the Union Pacific out of this case. Our cross claims are on file. They remain undetermined and with a reservation that testimony is to be taken at a subsequent date with respect to those cross claims, and of course, our position is and will remain at all times, if the court please, that the court must now proceed to determine the matters which are before it on the defendants' cross claims as against each other. Now, of course, manifestly the effect of the verdict must be taken into consideration.

The Court: Very well. Well, I shall withhold my ruling in respect of the matters to which Mr. Davis refers until [fol. 534] such motions as may be filed by the defendant Rock Island will have been filed and action will have been taken in respect thereof.

Is there anything further?

Mr. Howland: Nothing further at this time.

(Court adjourned at 4:30 p. m., October 19, 1955.)

[fol. 535] (Judgment).

(Filed in U. S. District Court on October 19, 1955).

United States District Court, Southern District Of Iowa
Western Division.

W. E. Williams, Plaintiff,
No. 1-196 vs. Civil
Chicago, Rock Island & Pacific Railroad Company, a Corp., Chicago & North Western Railway Company, a Corp.; Union Pacific Railroad Company, a Corp.; Defendants.

Procedure Of Trial, Trial Concluded, Verdict And Judgment and Order.

On this day this cause comes on for further trial, counsel appearing as of yesterday. The arguments of counsel having been concluded and the jurors having been instructed by the Court, retire in charge of a sworn officer into a private room to consider of their verdicts, and after some time spent in deliberation return into open Court with the following verdict.

"Verdict

We, the jury, find in favor of the plaintiff and against the Chicago, Rock Island & Pacific Railroad Company and fix the amount of plaintiff's recovery at $42,890.27 Dollars.

/s/ MRS. FLORENCE A. KNOWLTON
Foreman of Jury."

It Is Hereby Ordered And Adjudged that judgment be and the same is hereby rendered in favor of the plaintiff, W. E. Williams, and against the defendant, Chicago, Rock Island & Pacific Railroad Company, in the sum off $42,890.27, with interest thereon at the rate of five per cent (5%) per annum from this date.

[fol. 535a] It Is Further Ordered And Adjudged that judgment be and the same is hereby rendered against the defendant, Chicago, Rock Island & Pacific Railroad Company, for the taxable costs, taxed in the sum of $105.65.

It Is Further Ordered that the defendant, Chicago, Rock Island & Pacific Railroad Company, have thirty days in which to file a motion for new trial.

Order Journal Book 2,
Pages 278 and 279.

William F. Riley, Judge,
Present and Presiding.

Wednesday, October 19, 1955.

[fol. 536] **Motion Of Defendant Chicago & Northwestern Railway Company To Amend Verdict And To Alter Or Amend The Judgment.**

(Filed U. S. District Court, October 28, 1955).

[fol. 537] Comes Now The Chicago and North Western Railway Company, one of the defendants in the above entitled cause, and moves the Court to enter an order amending the verdict of the jury returned herein on October 19, 1955, so as to cause such verdict to state that the jury found in favor of the defendant Chicago and North Western Railway Company and in favor of the defendant Union Pacific Railroad Company, and to alter or amend the judgment entered herein to show judgment in favor of the defendant Chicago and North Western Railway Company and the defendant Union Pacific Railroad Company. This motion is made for the following reasons:

1. The jury was furnished with eight forms of verdict which were substatially to the following effect:

(a) In favor of the plaintiff and against all three defendants, with blank for amount of recovery.

(b) In favor of all three defendants.

(c) In favor of the plaintiff and against the Chicago, Rock Island and Pacific Railroad Company, with blank for amount of recovery.

[fol. 538] (d) In favor of the Chicago, Rock Island and Pacific Railroad Company.

(e) In favor of the plaintiff and against the Chicago and North Western Railway Company, with blank for amount of recovery.

(f) In favor of the Chicago and North Western Railway Company.

(g) In favor of the plaintiff and against Union Pacific Railroad Company, with blank for amount of recovery.

(h) In favor of the Union Pacific Railroad Company. The Jury, however, executed only the verdict described in

(c) above, which specified that its verdict was in favor of the plaintiff and against the Chicago, Rock Island and Pacific Railroad Company and set forth the amount of recovery. All other forms of verdict were returned by the jury unexecuted, and where blanks for the amount of recovery were provided, the blanks were not filled in on such unexecuted verdicts.

2. The Court instructed the jury prior to the final submission of the case to it that if it found for the plaintiff, that its verdict should only be against such defendant or defendants whose negligence, in the absence of any contributory negligence on the part of the plaintiff, proximately caused the injury to plaintiff, and the Court specifically instructed the jury that it was not to consider that it must return a verdict against all three defendants, if it found for the plaintiff, unless it found that all three were guilty of negligence proximately causing plaintiff's injuries, and that its verdict should be in favor of any defendant or defendants found not to have been guilty of negligence proximately causing said injuries to plaintiff.

[fol. 539] 3. If the jury had not intended to return a verdict in favor of the Chicago and North Western Railway Company and Union Pacific Railroad Company, it would, in accordance with the Court's instructions, either have executed and filled in the amount of recovery on the form of verdict specifically provided therefor and described in this motion under 1 (a) above, providing for a verdict against all three defendants, or if the jury had decided to return a verdict against either the Chicago and North Western Railway Company or the Union Pacific Railroad Company in addition to that in fact returned against Chicago, Rock Island and Pacific Railroad Company, but not against all three defendants, it would not only have returned its verdict against Chicago, Rock Island and Pacific Railroad Company but would also have executed and filled in the amount of recovery on the form described in 1 (e) above as against the Chicago and North Western Railway Company, or in 1 (g) above as against Union Pacific Railroad Company.

4. Upon the return of the verdict and prior to the discharge of the jury, the Court caused the verdict so re-

turned against the Chicago, Rock Island and Pacific Railroad Company to be read aloud in the presence of the jury, and the Court asked the jury if that was their verdict, to which they responded in the affirmative.

5. On October 19, 1955, the Clerk caused judgment to be entered in favor of the plaintiff and against the defendant Chicago, Rock Island and Pacific Railroad Company in the amount specified in the jury's verdict, but the Clerk did not cause judgment to be entered in favor of the defendant Chicago and North Western Railway Company and the defendant Union Pacific Railroad Company or either of them.

[fol. 540] 6. It is apparent from the foregoing, all of which appears of record herein, that it was the intention of the jury to return a verdict in favor of the Chicago and North Western Railway Company and to return a verdict in favor of the Union Pacific Railroad Company, and the verdict should be amended to conform to the jury's intention, and the judgment so altered or amended to show judgment in favor of the defendant Chicago and North Western Railway Company and the defendant Union Pacific Railroad Company.

[fol. 541] Motion of Defendant Union Pacific Railroad Company to Amend Verdict and to Alter or Amend the Judgment.

(Filed U. S. District Court October 28, 1955.)

[fol. 542] Comes now Union Pacific Railroad Company, one of the defendants in the above entitled cause, and moves the Court to enter an order amending the verdict of the jury returned herein on Oct. 19, 1955, so as to cause such verdict to state that the jury found in favor of the defendant Union Pacific Railroad Company and in favor of the defendant Chicago and North Western Railway Company, and to alter or amend the judgment entered herein to show judgment in favor of the defendant Union Pacific Railroad Company and the defendant Chicago and North Western Railway Company. This motion is made for the following reasons:

1. The jury was furnished with eight forms of verdict which were substantially to the following effect:

(a) In favor of the plaintiff and against all three defendants, with blank for amount of recovery.

(b) In favor of all three defendants.

(c) In favor of the plaintiff and against the Chicago, Rock Island and Pacific Railroad Company, with blank for amount of recovery.

(d) In favor of the Chicago, Rock Island and Pacific Railroad Company.

(e) In favor of the plaintiff and against the Chicago and North Western Railway Company, with blank for amount of recovery.

[fol. 543] (f) In favor of the Chicago and North Western Railway Company.

(g) In favor of the plaintiff and against Union Pacific Railroad Company, with blank for amount of recovery.

(h) In favor of the Union Pacific Railroad Company. The jury, however, executed only the verdict described in (c) above, which specified that its verdict was in favor of the plaintiff and against the Chicago, Rock Island and Pacific Railroad Company and set forth the amount of recovery. All other forms of verdict were returned by the jury unexecuted, and where blanks for the amount of recovery were provided, the blanks were not filled in on such unexecuted verdicts.

2. The Court instructed the jury prior to the final submission of the case to it that if it found for the plaintiff, that its verdict should only be against such defendant or defendants whose negligence, in the absence of any contributory negligence on the part of the plaintiff, proximately caused the injury to plaintiff, and the Court specifically instructed the jury that it was not to consider that it must return a verdict against all three defendants, if it found for the plaintiff, unless it found that all three were guilty of negligence proximately causing plaintiff's in-

juries, and that its verdict should be in favor of any defendant or defendants found not to have been guilty of negligence proximately causing said injuries to plaintiff.

3. If the jury had not intended to return a verdict in favor of Union Pacific Railroad Company and Chicago and North Western Railway Company, it would, in accordance with the Court's instructions, either have executed and filled in the amount of recovery on the form of verdict specifically provided therefor and described in this motion under 1 (a) above, providing for a verdict against all three defendants, or if the jury had decided to return a verdict against either Union Pacific Railroad Company or the Chicago and North Western Railway Company in addition to [fol. 544] that in fact returned against Chicago, Rock Island and Pacific Railroad Company, but not against all three defendants, it would not only have returned its verdict against Chicago, Rock Island and Pacific Railroad Company but would also have executed and filled in the amount of recovery on the form described in 1 (e) above as against the Chicago and North Western Railway Company, or in 1 (g) above as against Union Pacific Railroad Company.

4. Upon the return of the verdict and prior to the discharge of the jury, the Court caused the verdict so returned against the Chicago, Rock Island and Pacific Railroad Company to be read aloud in the presence of the jury, and the Court asked the jury if that was their verdict, to which they responded in the affirmative.

5. On Oct. 19, 1955, the Clerk caused judgment to be entered in favor of the plaintiff and against the defendant Chicago, Rock Island and Pacific Railroad Company in the amount specified in the jury's verdict, but the Clerk did not cause judgment to be entered in favor of the defendant Union Pacific Railroad Company and the defendant Chicago and North Western Railway Company or either of them.

6. It is apparent from the foregoing, all of which appears of record herein, that it was the intention of the jury to return a verdict in favor of Union Pacific Railroad

Company and to return a verdict in favor of Chicago and North Western Railway Company, and the verdict should be amended to conform to the jury's intention, and the judgment so altered or amended to show judgment in favor of the defendant Union Pacific Railroad Company and the defendant Chicago and North Western Railway Company.

[fol. 545] Motion of Defendant Chicago, Rock Island and Pacific Railroad Company for New Trial.

(Filed U. S. District Court, October 28, 1955.)

[fol. 546] Comes now defendant Chicago, Rock Island and Pacific Railroad Company, and within the time allowed by the Federal Rules of Civil Procedure moves the Court to set aside the verdict of the jury returned in this cause on or about October 19, 1955, and to grant a new trial of the issues, and for grounds thereof states and shows the Court:

1. The Court erred in permitting plaintiff to introduce Requests for Admissions Nos. 24, 25 and 26 made by plaintiff to this defendant, over the objections of counsel for this defendant, all of which pertain to the condition of car R.I. 145287 as found by the Union Pacific Railroad Company after delivery of said car to it by this defendant, and which referred to the fact that car R.I. 145287 was, upon receipt by Union Pacific Railroad Company, "bad ordered" because of worn brakeheads, and because the door on one side was out of the door track. Said admission was irrelevant and immaterial, related to the condition of the car after the same had undergone repairs by this defendant, was 13 days subsequent to the time of plaintiff's injury, and was remote from the condition of the car at the time of plaintiff's injury. In each and all of said respects the reading of said admissions was highly prejudicial to [fol. 547] this defendant, and was legally erroneous.

2. The Court erred in overruling objections interposed by counsel for this defendant to interrogatories propounded to plaintiff's witnesses Dudley Sigler, Emil Harring, and

Theodore P. Schmidt, calling in each instance for the opinion of the witness as to whether car R.I. 145287 was in safe condition for loading, was dangerous for persons to work about, or was reasonably safe, for each and all of the grounds of objection set forth by counsel for this defendant at the time said evidence was offered. The Court erred also with respect to the testimony of the witness Schmidt in response to further inquiries, for the reason that the hypothetical questions propounded to the witness did not include all elements disclosed by the evidence, and further, included facts and elements not shown by the record in this case.

3. The Court erred in permitting W. E. Williams, as a witness for himself, to testify at length concerning unfavorable experiences which plaintiff had suffered in accepting employment from employers other than Kansas Grain Company, such as his experiences in traveling 25 miles to work as a flagman, and then finding no work available, difficulty in performing furnace-cleaning work, and other unfavorable treatment accorded plaintiff by employers or prospective employers. Said evidence was wholly immaterial and irrelevant to any issue before the jury, and was prejudicial to this defendant.

4. The Court erred in excluding from the consideration of the jury defendant's R.I. Exhibit 19 and R. I. Exhibit 20, which exhibits were properly identified by witness Franks, were shown to be part of the records of Kansas Grain Company kept in the usual course of business, and which exhibits disclosed that Houlton Grain Company of Denver, Colorado, in its order to Kansas Grain Company, had specified routing over the defendant Union Pacific Railroad Company, and that Kansas Grain Company, in [fol. 548] accepting the order, had expressly contracted for routing "Denver via U.P." Said exhibits were properly identified and qualified, and directly tended to show that plaintiff's employer was under specific contract to route any cars shipped to Houlton Grain Company over the line of defendant Union Pacific Railroad Company. Said evidence was further admissible in explanation of

plaintiff's evidence to the effect that cars were not billed over any particular line of railroad, and that the destination was not determined at the time of loading. The exclusion of said exhibits R.I. 19 and R.I. 20 was grossly prejudicial to this defendant.

5. The Court erred in sustaining the objections of plaintiff and defendant Union Pacific Railroad Company to the offer of this defendant of Rules 1, 2, 3 and 4 of the A.A.R. Code of Rules governing interchange and repair of freight cars, for the reason that said rules were admissible, first, to explain why car R.I. 145287 was taken to the Rock Island repair track in the City of Council Bluffs after the accident occurred; second, because the rules disclosed that a railroad accepting an empty car for loading was its own judge of the fitness of the car; and third, because the rules explain the relationship between the defendants, and had probative evidentiary value that at the time of plaintiff's injury the car was in the possession of defendant Union Pacific Railroad Company, and that Union Pacific Railroad Company had accepted the car from this defendant, and, therefore, "furnished the car" within the meaning of the instructions given by the Court. The exclusion of the exhibit consisting of the A.A.R. Code of Interchange Rules was erroneous and prejudicial to this defendant.

6. The Court erred in excluding the testimony of the witness John A. Christiansen as a witness for this defendant with respect to the relationship existing between defend-
[fol. 549] ants Union Pacific, Chicago & North Western and this defendant, and particularly in sustaining objections to the proffered evidence of the said John A. Christiansen which was intended to explain the difference between a terminal switching railroad and a line-haul or road-haul railroad under the applicable tariffs. Said evidence was directly material upon the issue of whether this defendant or defendant Union Pacific was to be considered as the railroad "furnishing the car" within the meaning of the instructions giving to the jury.

7. The Court erred in excluding the proffered testimony of the witness John A. Christiansen with respect to the

operation and effect of tariff charges as between this defendant and defendant Union Pacific, and with respect to the effect of the tariff provisions as to making industrial tracks directly connected to one line of railroad available for transportation over other lines of railroad. Said evidence was directly material to the relationship existing, and was material in explanation of the reason that the car had been ordered from this defendant but was billed over the line of defendant Union Pacific.

8. The Court erred in excluding the proffered testimony of defendant's witness Elmer E. Smith, and in excluding the offers of defendant's R. I. Exhibits 15 and 16, for each and all of the following reasons, to-wit:

A. The evidence of the witness Elmer E. Smith that movement of the empty car to an industry was made without charge by all railroads, and was considered a part of the service of the car when loaded, was material, relevant and competent evidence to meet the plaintiff's evidence that the car had been ordered from this defendant.

[fol. 550] B. That the proffered evidence of the witness Smith, in which he identified Exhibit 15, which was the Association of American Railroads Code of Car Service Rules and Code of Per Diem Rules, was material, competent evidence, explaining the usual and customary handling afforded empty cars. That same was relevant and material upon the issue of whether this defendant or defendant Union Pacific had "furnished the car" for use by plaintiff's employer and by plaintiff. The exclusion of said evidence was extremely prejudicial to this defendant, and clearly erroneous.

C. The evidence of the said Elmer E. Smith identifying and explaining defendant's R. I. Exhibit 16, which was the "Council Bluffs-Omaha-South Omaha Per Diem and Reclaim Association Code of Reclaim Rules", and the rules themselves, were competent, relevant and material evidence explaining the operation and interchange of cars between railroads, and the situation of the railroads in a situation

of the character here disclosed by the evidence of plaintiff, viz., the car was ordered from this defendant and billed on the line of the Union Pacific Railroad Company by plaintiff's employer. The proffered evidence and R.I. Exhibit 16 were competent, material and relevant to the issue of whether this defendant or defendant Union Pacific had "furnished the car" as later submitted to the jury by the instructions of the Court.

9. The Court erred in ordering and directing, after the close of plaintiff's evidence and during the time that the evidence of this defendant was being introduced, that the case would be tried solely upon the issues arising upon [fol. 551] plaintiff's petition and the answers of the various defendants thereto, and not upon the whole case. Said ruling was made without any previous advance notice to the parties, and constituted an abuse of discretion upon the part of the Court, for the reason that this defendant had, in reliance upon the issues as they stood for trial at the opening of the trial, made its opening statement and outlined the relationship between the defendants with respect to car R.I. 145287, and plaintiff had introduced evidence which was competent and material upon those issues. By the ruling of the Court for a separate trial of the issues this defendant was deprived of the opportunity of introducing the evidence upon which it relied, and was placed before the jury in the position of failing to produce any evidence whatever to meet the plaintiff's showing with respect to car R.I. 145287. The ruling of the Court was further erroneous in that it was impossible as a matter of fact and of law, under the situation as it stood at the opening of the trial, to separate the issues arising upon the petition of the plaintiff and the answers of the defendants thereto from the issues arising on the cross claims. That if any separation of said issues were to be undertaken, the parties, and particularly this defendant, were entitled to advance notice of such fact so that they might meet the issues, make proper objections to the evidence of plaintiff, and not be prejudiced by the introduction of evidence by plaintiff which they could not subsequently meet after the Court had at-

tempted to require a separate trial of the issues arising on the cross claims. The ruling was further erroneous in that plaintiff's counsel had demanded a jury trial of all issues, and under the provisions of the Federal Rules of Civil Procedure the plaintiff could not withdraw said request after the trial of the action was commenced to a jury. The ruling of the Court for separate trials of the issues as between plain-
[fol. 552] tiff and defendants and as between defendants upon their cross claims was grossly prejudicial to this defendant. Said ruling was further erroneous and grossly prejudicial because the Court, by its order, changed the whole scope of the trial, and without notice to this defendant materially changed the scope of the evidence which could be introduced by this defendant after the plaintiff's evidence in chief had been received and plaintiff had rested.

10. The Court erred in sustaining objections of plaintiff and defendants Union Pacific and Chicago & North Western to Requested Admission of Fact No. 5, for the reason that same constituted competent, material and relevant evidence in the case, and explained the situation with respect to the operation of the river track referred to by plaintiff in his interrogatories addressed to defendants.

11. The Court erred in sustaining objections to defendant's offer of paragraphs 6 and 7 of the Requested Admission of Fact called for by this defendant, for the reason that the facts called for by said Request for Admissions were competent, material and relevant as showing the fact that this defendant was only a terminal switching line in the handling of car R.I. 145287, and in explaining further the relationship between this defendant and defendant Union Pacific.

12. The Court erred in sustaining objections to paragraph 8 of the Requested Admissions of Fact called for by this defendant, for the reason that the facts called for by said Request for Admissions were competent, material and relevant evidence upon the relationship existing between defendants.

13. The Court erred in excluding that portion of the Request for Admissions appearing in paragraph 15 of the

Request for Admissions by this defendant after the first [fol. 553] sentence thereof, for the reason that same called for competent, material and relevant evidence.

14. The Court erred in excluding from consideration of the jury the facts called for by paragraph 16 of the Request for Admissions of Facts by this defendant, for the reason that the same constituted competent, material and relevant evidence explaining the practices followed by plaintiff and others employees of the elevator.

15. The Court erred in excluding that portion of paragraph 29 of the Request for Admissions of this defendant, and reading as follows:

"and received, therefore, the published tariff of $213.25 for transportation of the car from the Kansas elevator in Council Bluffs, Iowa, to destination,"

for the reason that the same was material, competent and relevant evidence, and directly tended to show that defendant Union Pacific was the only railroad dealing with plaintiff's employer, and further explaining the situation shown by plaintiff's evidence, namely, that the car was ordered from this defendant but billed on the line of the Union Pacific Railroad.

16. The Court erred in excluding from the consideration of the jury the Request for Admission embodied in paragraph 30 of the Requests for Admissions of this defendant, for the reason that same constituted competent, material and relevant evidence as to the railroad "furnishing the car", as set forth in the instructions, and further showed that this defendant was acting merely as an agent of defendant Union Pacific.

17. The Court erred in sustaining objections to and refusing to permit this defendant to read in evidence paragraphs 31 and 32 of the Requests for Admissions of this defendant, for the reason that the same constituted competent, material and relevant evidence with respect to the

[fol. 554] railroad "furnishing the car", as set forth in the instructions. That the evidence was further material as explaining the fact that defendant Union Pacific was the carrier deriving revenue from the shipment, and that this defendant was acting as the agent of defendant Union Pacific in handling the car subsequent to the occurrence of plaintiff's injuries.

18. The Court erred in excluding from consideration by the jury and in sustaining objections of the other parties to the offer by this defendant of paragraph 33 of this defendant's Requests for Admissions of Fact, for each and all of the reasons urged with respect to the refusal of the Court to permit the reading of paragraphs 31 and 32.

19. The Court erred in overruling the motion of this defendant for a directed verdict made at the conclusion of all the evidence, for each and all of the grounds therein set forth.

20. The evidence is as a matter of law insufficient to justify any recovery on the part of the plaintiff against this defendant.

21. The verdict is contrary to the evidence and contrary to law.

22. The verdict is grossly excessive, and is apparently the result of passion and prejudice on the part of the jury.

23. The Court erred in refusing to give to the jury the substance of this defendant's Requested Instruction No. 2, wherein the jury was advised of the duty of plaintiff to minimize his damages by seeking work that he was physically able to perform, and that plaintiff was entitled to recover "only the difference between what he was reasonably [fol. 555] certain to have earned at the Kansas Elevator and the present worth of the amount which he has been, or will be, able to earn in the future," for the reason that same was a correct statement of the law directly applicable to the testimony. That the prolonged recitation by plaintiff of his efforts to obtain other employment made all the

more necessary a clear-cut statement by the Court that plaintiff was required to seek work which he was physically able to perform.

24. The Court erred in refusing this defendant's Requested Instruction No. 3, wherein the rule is stated with respect to the obligation of this defendant as to the condition of cars used for loading on another line of railroad. Said requested instruction is a correct statement of the rule, and the substance thereof was nowhere given to the jury by the Court.

25. The Court erred in refusing to give to the jury the substance of this defendant's Requested Instructions Nos. 5 and 6, wherein the jury was advised as to the legal effect of the act of defendant Union Pacific in accepting the bill of lading. Said requested instructions were a correct statement of the law directly applicable to the issues before the Court, and the omission of the Court to incorporate the same in his instructions to the jury was grossly prejudicial.

26. The Court erred in refusing to give to the jury the substance of defendant's Requested Instruction No. 7, wherein the rule is set forth that work expectancy is something apart from life expectancy. That work expectancy is dependent upon prospective retirement and other factors which have no bearing on the issue of longevity. The omission of the Court to give the substance of this defendant's Requested Instruction No. 7 with respect to work expectancy is further shown by the fact that the Court did give the portion thereof with respect to life ex-
[fol. 556] pectancy. In omitting all reference to work expectancy the Court erred to the prejudice of this defendant.

27. The Court erred in refusing to give to the jury defendant's Requested Instruction advising the jury to take into consideration the fact that any sums awarded to plaintiff were not subject to the payment of income tax, for the reason that the instruction was a correct statement

of the law directly applicable to the issues, and the refusal of the Court to give the same in substance was error prejudicial to this defendant.

28. The Court erred in its instructions to the jury, in that it wholly failed to adequately instruct the jury with respect to the basis upon which liability would exist upon this defendant and upon defendant Union Pacific Railroad Company. That the Court failed to advise the jury that the act of defendant Union Pacific in accepting billing of the car necessarily carried with it full responsibility for the condition of the car at all times after loading of the car was commenced. That the instructions of the Court were entirely inadequate to present to the jury the issues as presented between plaintiff and the three defendant railroads. The Court failed to instruct the jury that any duty or obligation owing by any railroad company must be based upon and arise out of the relationship of shipper and carrier as between plaintiff's employer and any one of the railroad companies.

29. The Court erred in giving Instruction No. 1, and particularly with respect to that portion of said instruction wherein the allegations of plaintiff's complaint with respect to the extent of the injuries sustained by plaintiff were set forth, for the reason that said statement unduly exphasized and repeated at length the extent of the plaintiff's injuries [fol. 557] and went far beyond the extent necessary to a fair statement of the issues. The Court further erred in respect to Instruction No. 1 in setting forth the date of the execution of the bill of lading by Union Pacific without in any way informing the jury as to the consequences which would follow upon the execution of said bill of lading.

30. The Court erred in giving to the jury Instruction No. 5 and in not amplifying same with respect to the duty and obligation of plaintiff to exercise care for his own safety at all times while working about the grain car. That while Instruction No. 5 abstractly correctly states the law, it was not made applicable to the circumstances of this case, and did not adequately inform the jury of the obligation of plaintiff to exercise care while working about the grain car.

31. The Court erred in giving subdivision (d) of Instruction 6 to the jury, for the reason that the Court wholly failed at any point to advise the jury as to the consequences of the acceptance of the car by defendant Union Pacific on the morning of February 11, 1953. Said instruction was excepted to upon such ground before being presented to the jury.

32. The Court erred in giving to the jury Instruction No. 8, and particularly in submitting to the jury the three specifications of negligence therein set forth, for the reason that this defendant was under no duty of inspection of car R.I. 145287 unless a shipper-carrier relationship existed between this defendant and the employer of plaintiff. That the specifications in addition are mere general catch-all allegations of negligence and not specifications of any act or omission charged against defendant. That said specifications are further misleading to the jury in that they made this defendant the insurer of the condition of its cars. That nowhere in Instruction No. 8 or elsewhere [fol. 558] were the jury told that the only obligation of any defendant was to exercise ordinary care with respect to both the inspection of the car and the door and track mechanism. Said error of the Court is particularly applicable with respect to specifications 2 and 3, in that in both of these so-called specifications the Court used language which made this defendant the insurer of the condition of the car.

Instruction No. 8 is further erroneous as to this defendant in that said Instruction No. 8, and other instructions, wholly failed to advise the jury as to the effect of the action of defendant Union Pacific Railroad Company in accepting billing on the car.

33. The Court erred in giving Instruction No. 10 because the same was in conflict with Instruction No. 8 wherein the specifications of negligence were set forth. That said instruction improperly stated the duty of this defendant with respect to said car, there being no relationship of carrier and shipper between this defendant and plaintiff's employer. Said instruction is further erroneous because it omits to inform the jury of the obligations of

the Union Pacific Railroad Company as a common carrier upon accepting billing of the car. That portion of Instruction No. 10 referring to "employees or persons rightfully engaged in closing the door of a railroad box car are regarded as invitees" is further erroneous as applied to this defendant. That said instruction imposes the duty of exercising ordinary care only upon the railroad "furnishing the car" and omits the essential element that the acceptance of the car by the Union Pacific made it the only party as to whom a shipper-carrier relationship existed.

[fol. 559] 34. The court erred in giving to the jury Instruction No. 10½ for all of the reasons specified with respect to Instruction No. 10.

35. The Court erred in giving Instruction No. 17 to the jury and in submitting to the jury a form of verdict which authorized a recovery of damages solely as against this defendant, for the reason that the primary obligation was upon defendant Union Pacific, and that this defendant could not be required to respond in damages to plaintiff unless there was a shipper-carrier relationship between this defendant and the employer of plaintiff.

36. The Court erred in giving to the jury Instruction No. 13, because it omitted to tell the jury that life expectancy and work expectancy were not identical, a subject covered by defendant's Requested Instruction No. 7, which has heretofore been referred to.

37. The Court erred in submitting to the jury forms of verdict which permitted the jury to return verdicts against individual defendants. The action of the court in submitting separate forms of verdict was particularly prejudicial to this defendant because the court had ordered a separation of trial as between plaintiff and the three defendants and between the defendants themselves; the court, upon the trial, excluded all evidence of the relationship between the defendants and instructed the jury that the matter of liability as between defendants would be determined by the court at a later date. Having ordered a separate trial of the issues between plaintiff and the three defendants and deferred the matter of trial as between the defendants to a later date for action by the court, the court should have submitted only two forms of verdicts, one

permitting a verdict against all defendants, and one finding in favor of all defendants. The action of the court in [fol. 560] permitting a verdict against one or more of the defendants was therefore unwarranted, excepted to by this defendant before the instructions were presented to the jury and was grossly prejudicial to this defendant.

38. The Court erred in giving Instruction No. 3½ and in commenting orally to the jury while the instructions were being delivered that the jury was at liberty to return a verdict against any one or more of the defendants, for all the reasons set forth in the last preceding paragraph and for the further reason that said instruction unduly emphasized the possibility of a verdict for plaintiff, and erroneously failed to advise the jury that the primary obligation was on the defendant Union Pacific with respect to the condition of the car.

For each and all of the reasons set forth above, defendant Chicago, Rock Island and Pacific Railroad Company, requests that a new trial of the issues be granted.

[fol. 561] Defendant Chicago, Rock Island and Pacific Railroad Company Request for Hearing on Cross Claims.

(Filed U. S. District Court, October 28, 1955.)

[fol. 562] Defendant, Chicago, Rock Island and Pacific Railroad Company, respectfully requests the Court to set down for hearing and trial the cross claims arising between the defendants to this action.

This defendant requests the Court to assign a trial date for same at Council Bluffs, Iowa, and at substantially the same time to hear defendant's Motion for a New Trial, and to rule upon the cross claims as between defendants at substantially the same time that the ruling is made upon this defendant's Motion for New Trial, so that any party desiring to appeal from any ruling may present the whole matter on one appeal to the Court of Appeals for the Eighth Circuit.

[fol. 563] Resistance Of Defendant Chicago, Rock Island And Pacific Railroad Company To Motions Of Chicago & Northwestern Railway Company And Union Pacific Railroad Company To Amend Verdict And To Alter Or Amend The Judgment.

(Filed U. S. District Court, October 31, 1955.)

[fol. 564] Comes now defendant Chicago, Rock Island and Pacific Railroad Company and resists the motions of defendant Chicago and Northwestern Railway Company served October 27, 1955, and the motion of defendant Union Pacific Railroad Company served October 28, 1955, both of which motions are substantially identical and seek amendment of the verdict and the entry of judgment in favor of said defendants, for each and all of the following grounds, to-wit:

1. There has been returned no verdict in favor of either of the moving defendants.

2. The motions to amend the verdict are not based upon any action taken by the jury pursuant to the instructions of the court.

3. That the motions to amend the verdict are beyond the jurisdiction of the court.

4. That insofar as said motions seek to have judgment rendered in favor of the defendants Union Pacific and Chi-
[fol. 565] cago and Northwestern they are premature, are not supported by the record and that the court has no power to render judgment at this time in favor of said defendants for each and all of the following reasons, to-wit:

(a) The court has, by its prior order, directed that separate trials be held upon the issues presented by the cross-claims of defendants against each other. Until said cross-claims have been heard and determined by the court no final judgment can be rendered in favor of any party defendant.

(b) The action of the jury in failing to make a finding either for or against defendants Union Pacific and Chicago and Northwestern simply demonstrates that the cause was improperly submitted to the jury by the court and supports the motion of this defendant for a new trial of the issues.

(c) That if the verdict be construed as a finding in favor of the defendants Union Pacific and Chicago and Northwestern on the issues submitted to the jury by the court, the court cannot enter judgment thereon until the cross-claims as between defendants have been heard and determined.

(d) The finding of the jury was based only on a fragmentary record, no evidence having been received by the court as to the relations between defendants and no explanation having been made of the rights of the parties arising out of the action of the plaintiff's employer Kansas Grain [fol. 566] Company in billing the car over the line of defendant Union Pacific after the loading of the car was completed.

[fol. 567] (Proceedings upon submission of Motion of Defendant, Chicago, Rock Island and Pacific Railroad Company for New Trial, and Motions of Defendants, Union Pacific Railroad Company and Chicago and Northwestern Railway Company to Amend Verdict and to alter or amend Judgment.)

(August 13, 1956)

On August 13, 1956 the motion of Defendant Chicago, Rock Island and Pacific R. R. Co. for a new trial, the motions of Defendants, Union Pacific Railroad Co. and Chicago & Northwestern Railway Co. To Amend the Verdict and for Judgment, and the matters arising on the cross claims of defendants against each other came on for hearing before the Court Hon. Charles E. Whittaker, U. S. Circuit Judge, sitting by special designation as United States District Judge, because of the illness of Hon. William F. Riley, and thereupon the following proceedings were had.

The Court: Let me make just a short statement of what I understand to be the issues in this case of Williams against Rock Island, et al. I have read every word of the file, have studied it, marked it up, and, of course, various interrogatories, answers and requests for admissions and answers. I understand the facts to be that the Northwestern owned an industry track in Council Bluffs known as

the River Track running from Seventeenth Street westerly to approximately the Missouri River, off which run switch tracks to various industries on either side; on a switch track leading off the River Track is the industry known as the Kansas Grain Company which in truth is a division of Flour Mills of America; by reason of its ownership switching on the River Track is done by Northwestern. On January 28, 1953 the Grain Company ordered thirty-five box cars from Rock Island, fourteen of which had been delivered by February 7. On February 9, 1953, the Rock Island selected three of its cars, including the offending one and delivered them on the 17th St. connection with the River Track, with switching orders to the Northwestern to spot those cars at Kansas Grain Company. That switch-
[fol. 568] ing movement was made by the Northwestern some time between 5:00 p.m. February 9 and 11:00 p.m. that day and the offending car spotted at Kansas Grain Company. On the next day, that car, one of the three I have mentioned, was loaded with shelled corn which operation was completed about 4:30 to 4:45 p.m. that day. After completion of loading, a core drill was made for samples to be taken to the Omaha Exchange for testing as to grade, moisture content and the like. After the sample was taken, but before the grading was done, employees of the Grain Company, as was their custom, attempted to close and afterward to seal the door of the offending car; one of the employees of the Grain Company, designated for that purpose, was the plaintiff Williams; in the course of his efforts to close that door it fell from the car and upon the plaintiff by reason of a claimed defect in its hanging. It weighed five hundred pounds and it seriously hurt him. Report of that occurrence was made that day to Rock Island and Northwestern.

Now I pause in chronology to say that the sample of corn from the car was enroute to the Omaha Exchange for grading purposes; received that evening graded the next morning and advice was given by it to the Omaha office of the Grain Company saying that this corn graded No. 2 shelled corn. Upon that information being received by the Omaha office of the Grain Company, it telephoned to the elevator in Council Bluffs saying that the corn had graded No. 2 and therefore under a contract in existence was to

be billed to the order of the Grain Company, Denver, Colorado, notify a certain notifyee, by way of Union Pacific Railroad. This was about 10:00 o'clock the morning of February 11, the day after the occurrence of the accident; [fol. 569] sometime thereafter, about 10:30 a.m. a bill of lading was presented by Kansas Grain Company to the Union Pacific for the shipment and Union Pacific signed a bill of lading.

After the Kansas Grain Company had notified Rock Island and the Northwestern of the injury to plaintiff, Rock Island and Northwestern withdrew the car and without unloading it, took it to the Rock Island repair track where it under went repairs. It was not returned until February 23 at which time it was tendered to the Union Pacific, with the ordinary waybill and signed by Union Pacific, and it took possession of the car that day, made an inspection of it in its own yards and found it bad order because of some break heads out of position and also because the other door on the car was partly off the hinges. It contends that it was bound to receive the car, and it did and transported it on to Denver, Colorado.

Plaintiff filed his lawsuit against all three of these railroads for damages for bodily injury, in the first count in which he specified the negligence of each. In the supplemental second count, he says the same thing but without specifying details he says the negligence was joint and concurrent. Each of the defendants answered. They say "Not me; I was not guilty. If there was any negligence, it was on the other fellow." Then a system of cross claims was commenced; I think by the Northwestern, saying that "if ultimately we are held to be liable in the case we are only secondarily liable and primary liability is on Rock Island; and we want a declaration accordingly." That happened with respect to everyone of defendants and then they even amend them, and there are replies and answers—a regular maze of pleadings. The admissions met boldly. [fol. 570] the issues and it seems to me the fact matters involved are very near nil now and the questions presented are largely ones of law.

After plaintiff had rested, defendants put in motions for directed verdict and ruling on them was reserved; defend-

ants then proceeded to offer evidence and after having offered evidence it went on to meet the issues tendered by plaintiff and they sought to get into issues between themselves on these cross claims. The court said "No, we won't hear those. We will not confuse the plaintiff's case with this scrap between the railroads. That, if ever to be tried, will be tried before the court at a later time." There were objections to that procedure on the par. of the railroads contending that issues of fact were tendered in their cross claims. The court then submitted the case to the jury. There were various requests for charge and eight forms of verdict were given to the jury. One of them said "We, the jury, find the issues for plaintiff and against all three of the defendants, and assess the plaintiff's damages at.....dollars." The next one said "We find the issues in favor of the three defendants and against the plaintiff." The next one said, "We find the issues in favor of plaintiff and against Rock Island and assess the plaintiff's damages as.....dollars." And the next one said, "We, the jury, find the issues in favor of defendant Rock Island and against the plaintiff," and then repeat for Union Pacific and Northwestern. The jury, after deliberating, returned a verdict in favor of plaintiff and against Rock Island alone in the sum of forty-two thousand odd dollars. Counsel for Rock Island filed their motion for a new trial within ten days and likewise within ten days defendants Northwestern and Union Pacific filed motions entitled "Motion to Amend Verdict and Motion to Amend the Judgment", the point being, they [fol. 571] say, that it is implicit that the jury intended to say by their verdict "and we further find the issues in favor of Northwestern and Union Pacific" and the court should revise the verdict accordingly. Then they say that in any case the court should amend the judgment construing the verdict and have the judgment exonerate Northwestern and Union Pacific.

Now, talking for just a minute about these adversary claims, as adversary co-defendants, the only possible liability upon the part of the Northwestern would be negligence on its part during the course of the switching operation. I understand from the file that there was no evidence of negligence on the part of the Northwestern in the course

of that switching operation, and if not, then the question is how could it be liable, and why was not its motion for directed verdict given? From the recital of facts which I have made, which I am satisfied is accurate in the main, Union Pacific did not know, nor consignor Kansas Grain, at the time of the accident where the car was going or over what line of railroad. Bill of lading was not even tendered, as I understand, until the next day at 10:30 a.m. The waybill was not signed until February 23. Now I understand it to be the contention of counsel for Rock Island, repeatedly stated through this file and with such clarity, that I can understand it well that under the interchange rules or rules of the Association of American Railroads or some other, when Union Pacific became the out-bound carrier for this car it became the lessee of the car retroactive to the time of spotting of the car for loading which was, of course, before the time of the accident.

Now, is that the law? We will hear you on it, but I call your attention to the fact that this is not an action in contract. Plaintiff's action is one at law for negligence. I readily agree that is between themselves the whole field was open to contract. Is there a contract which in express [fol. 572] terms impose a liability upon Union Pacific for tortious conduct or defect with relation to the car that occurred prior to the time it had any notice it was to be the consignee? Should we not therefore hear first the question of the motion for a new trial and in conjunction therewith, the motions of these defendants to revise the verdict and judgment, leaving for further consideration and trial, if necessary the issues between the railroad defendants.

Mr. Anderson: I make this one suggestion as to procedure. Perhaps the better order would be to proceed with the motions to anmend the verdict first so we can determine what the status of the main case will be before the argument upon motion for a new trial.

The Court: What do you say about that?

Mr. Howland: In the main, you have all of the principal issues in this case at your fingertips and have very thoroughly expressed them. There are two points with respect to the factual situation which I think have not been

fully or correctly expressed—there was an issue tendered by the pleadings as between the plaintiff and Rock Island as to [to] who had furnished that car, as to who was responsible for the condition of the car. Plaintiff was permitted to introduce evidence showing that an order had been placed for the car with the Rock Island and the Rock Island had supplied the car in response to that order, that the car had then been taken, and in some manner wholly unexplained, been billed out on the line of the Union Pacific Railroad for Denver. There was a definite and material issue which Rock Island was entitled to meet at that stage of the proceedings and that situation required that there be an explanation of the manner and method by which this particular car—a Rock Island owned car, which had been supplied by the Rock Island, came to be devoted to the [fol. 573] service of the Union Pacific Railroad. There is one other circumstance which the court adverted to and that is the statement that Union Pacific did not know until after the car was graded over what line of railroad this particular car would be billed out. We propose, by our evidence, to show, and we think we should have been permitted to make the showing at the time of the original trial of the issues, that there was only one car of oats billed out over the Rock Island that was loaded that particular day, and there was no corn billed out over the Rock Island; the elevator only loads cars for which orders have been received, and there being no orders from Rock Island points for No. 2 shelled corn there could be no question but that it was not in the contemplation of the elevator people that the cars of corn that were being loaded would be moved over the line of the Rock Island Railroad.

The Court: How could that establish a liability on the Union Pacific, Mr. Howland? They couldn't know of the fact that contracts were in existence between the grain company and its purchasers whereby shipments were to go to particular destinations. How would that affect the Union Pacific's liability in negligence on the car for the day before they got it or it was billed?

Mr. Howland: My view of the rule of law which governs this case is that the primary duty and responsibility with respect to furnishing the car rests upon the line-haul car-

rier in a situation such as we have here at Council Bluffs, where you have terminal switching and a line-haul movement. The primary duty being upon the railroad which receives the line-haul, receives the revenue for movement of the car from the elevator at Council Bluffs to the destina-
[fol. 574] tion specified in the bill of lading, the Union Pacific necessarily assumed responsibility for the condition of this car at the time billing was actually taken. That of course, is the nub of the case. My position is this: That there was important, material and relevant evidence which was proper to be introduced upon the trial of issues between the plaintiff and the three defendants excluded by the ruling which the court made, first in dividing up the issues, and second, in excluding our evidence.

The Court: I do not want to hear any evidence until I determine what has been done has been good. The first question is, "Is what already has been done legally sound, or is it erroneous?" If sound, it ought to stand; if erroneous, we ought to set it aside. Let's take the assignments in the motion for a new trial. I will be glad to hear from you, Mr. Howland.

(At this time counsel for Chicago, Rock Island and Pacific Railroad Company made an oral argument upon the motion of that defendant for a new trial after which counsel for plaintiff was heard.)

During the argument upon the motion for new trial, the following colloquy occurred between counsel for Chicago, Rock Island and Pacific Railroad Company and the court:

Mr. Howland: The relationship, the obligation, this duty that rested upon the railroad in this case was a duty arising out of and superimposed by law upon a carrier-shipper or carrier-consignee relationship.

The Court: Which you say did not exist between the Grain Company and the Rock Island?

Mr. Howland: It started out to exist, yes.

The Court: Was there a carrier relationship between them?

Mr. Howland: I will offer and introduce in evidence at this time defendant Rock Island Exhibit 22.

Mr. Anderson: Objected to as immaterial and irrelevant to any issue in this case as between the Rock Island and defendant Union Pacific.

The Court: We will receive it; let it be overruled.

[fol. 594] Defendant Rock Island Exhibit 22 is reproduced as follows:

Deft. R.I. Ex. 22.

8/13/56
M.J.D.

Circular T-71
Association Of American Railroads
Operations and Maintenance Department

J. W. King, Vice-President L. R. Knott, Secretary

Furnishing Equipment For Loading
In Switching Service.

To The Members:

The following regulations covering the furnishing of equipment for loading in switching service, as recommended by the Committee on Car Service, are hereby approved for guidance of member roads.

1. Shippers should place orders for equipment desired with the road on which cars are to be loaded.

2. It is the obligation and right of the road haul carrier to provide cars for loading on another line in switching service for movement to or via such road haul carrier except as otherwise provided in paragraph 3.

3. It is the obligation of the road performing the switching service to provide equipment under the following conditions:

(a) When cars are to be loaded to a destination within the same switching limits.

(b) When suitable cars owned by the road-haul carrier or other ownerships which may be used in accordance with Car Service Rules are available on loading line within the switching district.

4. A road should not load its own equipment in switch service when such loading is for movement via road-haul connection if such road-haul connection is able to promptly furnish cars which can be used in accordance with the Car Service Rules and which can be delivered for loading if ordered by the switching line. (Such application is in violation of Car Service Rule 1.)

[fol. 595] 5. Road-haul lines, in furnishing cars on orders placed by switching lines, are responsible for observing the Car Service Rules in filling such requisitions. Loading line should so apply cars received on order as to produce best practicable performance under Car Service Rules.

All roads are urged to be governed accordingly.

On behalf of the General Committee.

Respectfully

sgd L. R. Knott,
Secretary.

[fol. 596] Mr. Howland: Now may it be conceded, Mr. Anderson, that defendant Rock Island Exhibit 21 is the Code of Rules governing the condition of and repair to freight cars for interchange of traffic, effective January 1, 1953, of the Association of American Railroads and that the booklet is the booklet so promulgated by the Association and that Union Pacific and Rock Island are both parties signatory to the so-called list of subscribers.

[fol. 597] Mr. Anderson: I will stipulate that the document is so entitled, and that the Union Pacific and Rock Island are signatories to the original code.

Mr. Howland: We offer the following portions of Rock Island Exhibit 21, to-wit: Rules 1, 2, 3 and 4 commencing

on Page 11 and subsequent pages to the end of Rule 4 and the preface appears on Page 10 of said volume.

Mr. Anderson: Defendant Union Pacific objects on the ground that the exhibit is irrelevant and immaterial.

The Court: All right. The same ruling as before. We will receive it.

(Defendant Rock Island Exhibit 21)

8/13/56—M.J.D.

Page 10.

Code of Rules

Governing the Condition of, and Repairs to, Freight Cars for the Interchange of Traffic.

Preface.

These rules are formulated as a guide to the fair and proper adjustment of all questions arising between car owner and handling company with the intent of:

1. Making car owners responsible for and, therefore, chargeable with the repairs to their cars necessitated by ordinary wear and tear in fair service; by the Safety Requirements and by the Standards of the Association of American Railroads.

2. Placing responsibility with and providing a means of settlement for damage to any car, occurring through unfair usage or improper protection by the handling company.

3. Providing an equitable basis for charging such repairs and damages.

Inspection of freight cars for interchange and method of loading will be in accordance with this Code of Rules and the Specifications for Tank Cars and Rules Governing the Loading of Commodities on or in Cars issued by this Association. Methods of recording inspection and repairs of cars and billing therefor under these Rules should be in accordance with Recommended Practice Regulations Governing Inspection and Repairs of Cars and Billing Therefor

as shown in the A. A. R. Manual of Standard and Recommended Practice.

Page 11.

Rules 1 and 2.

Care of Foreign Freight Cars.

Rule 1. (a) Each railroad is responsible for the condition of all cars on its line, and must give to all equal care as to inspection and lubrication.

(b) Repairs should be made by car owner insofar as may be practicable. In the event a foreign car requires repairs account of owner's defects, such repairs may be made subject to the following conditions:

1. Repairs to loaded cars must be confined to the minimum necessary for the safety of car, lading and trainmen.

2. Repairs to empty cars located at points where there is a direct connection with car owner, or where there is an intermediate switching line to car owner and cars are acceptable to such switching line for movement to car owner, must be confined to the minimum necessary for safety of trainmen and safe movement of car to home line; except where car is subsequently loaded on repairing line or on any line in same switching district in which the repairs were made, in which event paragraph (b-1) applies.

3. Repairs to empty cars at other points must be confined to the minimum necessary for safety of car and trainmen; except where car is subsequently loaded on repairing line or on any line in same switching district in which the repairs were made, in which event paragraph (b-1) applies.

4. Empty cars of lower loading classification may not be repaired for Class A loading without car owner's consent.

Note.—Cars of "lower loading classification" as above mentioned refers to cars the general condition of which is such that extensive repairs would be required to place them in suitable condition for Class A loading. Miscellaneous minor repairs to damaged portions of flooring, roofing, sheathing, lining or doors on cars required for, and which are otherwise suitable for Class A loading, is not prohibited.

5. Cars requiring repairs so extensive as to be reportable under Rule 120, shall be handled in accordance with that rule.

Interchanging Freight Cars.

Rule 2. Cars having defects for which delivering company is responsible must be properly carded when offered in interchange.

Empty cars offered in interchange must be accepted, providing they conform to the requirements of Rule 3 and are in safe condition for movement, the receiving road to be the judge. However, empty cars equipped with journal roller bearings may be rejected if such roller bearing units are in defective condition.

Owners must receive their own cars, when offered home for repairs, at any point on their line, subject to the provisions of these rules.

Empty cars furnished on orders for specific lading must be in serviceable condition for such lading, the receiving road to be the judge.

Loaded cars offered in interchange must be accepted, with the following exceptions (a) to (d), inclusive:

[fol. 598] • • • •

Rule 4.

Use of Defect, Original Record of Repairs, Billing Repair and Joint Evidence Cards.

Rule 4. (a) In the case of damage to a car for which the delivering line is responsible, such line must at the first available inspection point, attach defect card to cover. Car owner should repair such defect carded defects and remove defect card the first time car is shopped to car owner's repair track or repair shop. On cars extensively damaged which are forwarded home for repairs, the defect card, in addition to the defects noted, shall bear notation "Home for repairs." This notation shall be applied only by the company issuing the defect card. No alterations

may be made to defect card except by company issuing same or in cases of partial repairs as outlined in Rule 5. Defect cards cannot be repudiated. If only a portion of the unfair usage damage is repaired, defect card for the remainder of such damage must be applied prior to release of car.

[fol. 599] JOHN A. CHRISTIANSEN, called and sworn as a witness on behalf of the defendant C.R.I.&P. R.R. Co. testified as follows:

Direct Examination.

By Mr Howland:

I live in La Grange, Illinois, a suburb of Chicago, and I am General Freight Agent for the Chicago, Rock Island and Pacific Railroad Co. I handle generally the presentation of cases before the Interstate Commerce Commission involving rates and tariffs and am conversant with the method of publishing tariff charges followed by railroad companies in the United States. I have been with the Rock Island Railroad for thirty-four years, all of that time in the Freight Traffic Department, involving rate adjustments, tariff publications, interpretation of tariffs, and for the last ten or eleven years handling these Interstate Commerce Commission matters. Rock Island Exhibit 23 is a tariff which covers the published switching charges [fol. 600] of the Rock Island Railroad at various points on its line. The tariff publication originally became effective June 1, 1946 and remained in effect until some time in 1955.

Mr. Howland: At this time defendant Rock Island desires to offer and introduce in evidence Defendant Rock Island Exhibit 23.

The Court: Is there objection? Do you want to put the whole thing in evidence?

Mr. Howland: No. I don't care to offer anything except the Council Bluffs references.

The Court: Can you identify by lines some way that portion of Exhibit 23, consisting of page what, or something like that.

Mr. Howland: Page 45, referring to Council Bluffs, Iowa, showing the switching rates to and from industries under Group "A" and Group "B".

The Court: Industries located at Council Bluf , Iowa, are set forth on page 45 of that exhibit are they?

The Witness: Yes, sir.

Mr. Howland: We desire to offer and introduce in evidence page 45 of the tariff Exhibit 23.

Mr. Anderson: Defendant Union Pacific objects on the ground that such exhibit is irrelevant and immaterial.

The Court: Well, I really think it is, but I am going to receive it.

In connection with this same matter amend Appellant's Record at the top of page 447 before the first paragraph to show the following examination by Mr. Howland:

Now Mr. Christiansen, does that set forth on page 45 of Exhibit Rock Island 23, together with other portions of the Exhibit the prevailing switching charge for movement from the elevator of Kansas Grain Company, of loaded cars of grain out-bound to connections with line-haul railroads? A. Yes, sir.

Mr. Howland: At this time defendant Rock Island offers and introduces in evidence Page 45, Exhibit 23, referring to Council Bluffs, Iowa, showing switching rates to and from industries under Group "A" and Group "B".

Mr. Anderson: Defendant Union Pacific objects on the ground that such exhibit is irrelevant and immaterial.

The Court: Well, I really think it is, but I am going to receive it.

Mr. Howland: May it be conceded that the elevator referred to in the tariffs set forth on Page 45 of Rock

Island Exhibit 23 as the Butler-Welch Grain Company is the elevator of Kansas Grain Company?

Mr. Anderson: If you tell me it is, I will agree.

Mr. Howland: It is.

The Court: All right. We will so consider it.

[fol. 601] Defendant Rock Island 23 exhibit consists of four sheets as follows:

Defendant Rock Island 23.

MJD August 13, 1956.

(a) Title page of

The Chicago, Rock Island And Pacific Railway Company
Joseph B. Fleming and Aaron Colnon, Trustees

Freight Tariff No. 21432-W
(Cancels Freight Tariff No. 21432-V)

Showing

Switching And Other Terminal Charges
and Car Rental Charges

At

Junctions and other Points on C. R. I. & P., including list of business firms, industries, elevators, etc., reached by C. R. I. & P. at such points

Also

Rules Governing Absorption of Drayage, Switching, Cleaning, Bedding, Disinfecting, Loading, Reconsigning, Trackage, Transfer, Trap-car, Unloading and Weighing Charges.

Issued April 25, 1946 Effective June 1, 1946

The form of this publication is authorized by Special Permission of the Interstate Commerce Commission, No. 15585.

(Here follow list of Traffic Officers of Chicago, Rock Island & Pacific Railway Company and issuing Agent).

(b) Sheet 9 of Tariff 21432-W containing Items 1, 2, 5 and 10.

(Items 1, and 2 contain instructions to agents with respect to reporting names of new industries, changes in location, eliminations account discontinuance of business, etc.)

[fol. 602]

Item 5 When more than one item number is shown on a general subject, all items carried in connection with such general subject must be considered before interpretation of rule is made.

Item 10 (a) Group A rates are reciprocal switching charges and apply only in connection with a Road Haul movement.

Except as otherwise provided, rates shown are for switching service between Industries named and points of interchange with connecting railroads.

(b) Group B rates will apply as specifically provided on Intra-Plant, Intra-Terminal or Inter-Terminal Switching, (i.e. switching not involving road-haul service. (See Note below).

(c) Switching charges (unless otherwise specified) will cover handling of cars loaded in one direction and empty in the other directions, between points provided for. If cars are loaded in both directions, regular charge will be made for each loaded movement.

(d) Empty cars placed at team tracks or industries, which are returned empty account no load, or empty cars otherwise handled and returned empty to or from team track, industries or connections, will be subject to

lowest charge for movement of car under load.

(e) Switching charges Between industries And points of interchange with connecting carriers will also apply on shipments of Company Scrap and other material sold F.O.B., C. R. I. & P. tracks.

Note—Inter-plant, intra-terminal and inter-terminal switching is defined as follows:

Intra-Plaint Switching—A switching movement from one point to another point within the trackage limits of the same plant or industry.

Intra-Terminal Switching — A switching movement (other than intra-plant switching from one point to another point on the same road within the switching limits, of one station or industrial switching district.

[fol. 603] Inter-Terminal Switching — A switching movement within the limits of the same station or industrial switching district as follows:

Between C. R. I. & P. tracks and point of interchange with connecting railroads on traffic destined to or originating on tracks of connectint railroads.

(c) Page 10 of Tariff 21432-W under General Instructions contains Items 15, 20, 30, 35 and 40.

Items 15, 20 and 30 refer to "Arkansas Stations Application of Charges", "Switching Charges on Grain Accorded Transit Privileges at Oklahoma Points", "Switching Cars For Loading or Unloading at Texas Points" and Switching Charges on One Car Containing Two or More Car Load Shipments At Points in Texas" and are not here set out.

Item 35 Application Of Switching Rates To New Corporations, Firms And Individuals Or To Such Whose Names Have Been Changes

Applies At All Stations, Except Bowie, Texas

The rates shown opposit the corporations, firms or individuals, named herein are the switching charges, in dollars and cents per car, to or from the industry tracks on which said corporations, firms or individuals are located. The names of said corporations, firms, or individuals being given only for the purpose of identifying said industry tracks, and in instances where both name of the corporation, firm or individual and the location appear, the name of the firm or industry is shown for information.

In case of the location of a new industry on a certain industry track the switching charge to or from that portion of the industry track upon which the new industry is located will be the same as is applicable to such industry track upon which other industries are located and when changes occur in the name of any corporation, firm or individual using certain industry tracks this issue will be corrected as soon as practicable. In the event the switching charge to or from all portions of an industry tracks are not the

same, the switching charge to be applied to or from that portion of an industry track upon which a new industry may be located will be the switching charge applicable to that portion of the industry track upon which the next more distant industry is located.

[fol. 604]

Item 40 Explanation Of Delivering And Receiving And Intermediate Carrier

Delivering Carrier or Line is the railroad which causes delivery of consignment to connecting railroad.

Receiving Carrier or Line is the railroad which receives consignment from connecting railroad.

Intermediate Carrier or Line is the railroad which handles the consignment between the delivering and receiving railroad.

(d) Page 45 of Tariff 21432-W under the designation "Council Bluffs, Iowa" sets forth a list of firms or industries and provides Group "A" Rates As Explained in Item 10 as follows:

	Group A Rates in Dollars and Cents Per Car (Except as noted)		Group B	
	C. & NW	All Other Lines		
Butler Welsh Grain Co.	$2.48*	$2.48	See	
	See Note 24		Item 1890	

485	All commodities, carloads, minimum weight 60,000 pounds	Industries and delivery points on C.R.I.&P. at Council Bluffs, Iowa	Point of interchange with direct connections at Council Bluffs, Iowa	.....	2¼ cents per 100 pounds
490	All commodities, carloads, minimum weight 31,500 pounds	Industries on C.R.I.&P. at Council Bluffs, Iowa	Industries on C.R.I.&P. at Council Bluffs, Iowa	.....	2¼ cents per 100 pounds
495	Grain, carloads	Elevators located on C.R.I. & P. at Council Bluffs, Iowa	C.R.I.&P. Team Track at Council Bluffs, Iowa	.....	$9.90
500	Grain, carloads, minimum weight 45,000 pounds	C.R.I.&P. Team Tracks at Council Bluffs, Iowa	C.R.I.& P. point of interchange with connecting carriers for industries on tracks of other carriers at Council Bluffs, Iowa	.....	2¼ cents per 100 pounds
505	Grain, carloads, minimum weight 42,000 pounds	BETWEEN Grain Elevators served by First Avenue River Track at Council Bluffs, Iowa		.....	1¾ cents per 100 pounds
510	Grain, carloads	Butler Welsh Grain Co. Scoular-Bishop Elevator	C.R.I.&P. point of interchange with other lines in Council Bluffs, Iowa, on shipments to or from industries in Council Bluffs, Iowa, Omaha and South Omaha, Neb., located on such other lines	.....	$3.47
515	All commodities	Where C.R.I.&P. performs switching between any two lines at Council Bluffs, Iowa		$2.48	$3.47

(24) Applicable only on Grain, Grain Products and Seeds.
(28) Applicable on all commodities, except Grain, Grain Products and Seeds.

Mr. Howland: There was no carrier relationship with respect to this car; there started out to be one; it never materialized because

[fol. 575] The Court: Then there never was one?

Mr. Howland: Now, I am frank to say that if that car at the moment it was being switched in by the Northwestern engine and the door had fallen off the car and upon the plaintiff at that time before any loading started or anything was done with respect to it, I think perhaps we would have a question of common law obligation because the car was being furnished in connection with the business of the Rock Island Railroad.

The Court: Yes, but not to the question of relationship between the Grain Company and the Rock Island. Was there ever a shipper-carrier relationship between them as respects to this car?

Mr. Howland: There was not. There was an abortive shipper-carrier relationship—I mean that the Rock Island, when it sent the car over there, had the expectations that the relationship would materialize. But it didn't materialize.

The Court: It never existed at any time?

Mr. Howland: That is right: And we come back to the proposition—the fundamental proposition as to whose duty it was to furnish that car.

The Court: Who in fact did furnish it?

Mr. Howland: The Rock Island supplied the car. There is no controversy about that.

The Court: That is what I thought.

Mr. Howland: But when the Union Pacific grabbed the car and when the consignor, having taken that car into his custody for loading—

The Court: The grain company you mean?

Mr. Howland: Yes, the grain company.

The Court: It took the car in custody for loading. All right, what?

Mr. Howland: The consignor having taken the car into his custody for loading, the duty with respect to that car, when the loading started, and all during the loading and after the loading, it was on the grain company's premises from that time on, that was the obligation of the carrier that got the line haul.

The Court: Subsequently issued, Union Pacific, you say.

Mr. Howland: Yes, that's right.

The Court: Now tell me why.

Mr. Howland: Because it is the primary duty and obli-
[fol. 576] gation which the A.A.R. Code of Rules recognizes and applies, and I think it arises as a matter of law that that duty shifted from Rock Island responsibility to

Union Pacific responsibility when they started to load the car, at least at that time.

The Court: But it wasn't known until the next morning, anyway, that it was going to be billed Union Pacific was it?

Mr. Howland: The consignor had not determined yet, and it was up to the consignor, the employer of the plaintiff.

The Court: But you say that the Rules of the Association of American Railroads and the law generally made the outbound carrier who received the billing, though after the occurrence, legally liable for the condition of the car back to the time the car was spotted at the Grain Company for loading. Do you not say that?

Mr. Howland: That is my contention.

Following argument on the motion for a new trial, the Court heard arguments of counsel for the Chicago & Northwestern Railway Company and Union Pacific Railroad Company on their motions to amend the verdict and to amend the judgment entered by the clerk on the verdict of the jury.

At the conclusion of these arguments, the Court dictated to the reporter the following ruling which was transcribed, signed and filed in the office of the Clerk on August 15, 1956.

[fol. 577] Memorandum on Chicago, Rock Island and Pacific Railroad Company's Motion for New Trial and upon Motions of Chicago and North Western Railway Company and Union Pacific Railroad Company to Amend Verdict and Judgment.

United States District Court
Southern District of Iowa
Western Division

W. E. Williams, Plaintiff,

Civil Action vs. No. 1-196

Chicago, Rock Island and Pacific Railroad Company, a corporation; et al., Defendants.

The matters of:

(a) The motion of Chicago, Rock Island and Pacific Railroad Company for a new trial herein; and,

(b) The motion of Chicago and North Western Railway Company for an order of the Court amending the verdict of the jury, and the judgment thereon; and,

(c) The like motion of the defendant Union Pacific Railroad Company,

came on regularly before the Court for hearing at Council Bluffs, Iowa, on this 13th day of August, 1956, pursuant to due notice, and were fully argued by counsel; and the Court having now considered the arguments, the positions and briefs of the parties, and the law, and being fully advised in the premises, does now make the following orders:

1. It Is Ordered and Adjudged by the Court that the motion of the defendant Chicago, Rock Island and Pacific Railroad Company for a new trial herein be, and it is hereby, overruled and denied.

An exception is allowed.

2. That the separate motion of the defendant Chicago and North Western Railway Company for an order amending the verdict of the jury and an order altering or amending the judgment herein, is treated as follows:

[fol. 578] I am aware that some courts have said that a court may amend the verdict of a jury to make it speak the obvious intention of the jury. Perhaps it is but a choice of words, but I am reluctant to "amend" the verdict of a jury. I am far less reluctant to "construe" it. I think here, that by necessary implication, the jury's verdict means to find in favor of the defendant Chicago and North Western Railway Company, and likewise, the defendant Union Pacific Railroad Company, for the Court had told the jury to find against the defendants, one or more, whom they found to have been guilty of negligence that constituted a direct cause of plaintiff's injuries, and the jury returned a verdict against Rock Island alone.

Now, I do not, under the record here, see how the jury could have done anything else. That is to say, I do not see

how if they found for the plaintiff—perhaps they could have found against the plaintiff—but I do not see how they could have found for the plaintiff against the North Western or Union Pacific. I will discuss the North Western's situation first. I do not see how they could have found against North Western, first, because this was an action in negligence brought by the plaintiff against it, and there was no evidence of its negligence. The only evidence, respecting it, that has been at all referred to here was that, after the injury to the plaintiff, it was found that there were some scrapes or scratches on the car in question, and a stirrup on the car was bent; but that such happened while this car was in the switching movement by North Western in no place appears. So it would be wholly conjectural to allow a jury to infer that such happened while the car was in the custody of the North Western or that it in way affected the allegedly defective door of the offending freight car, and I, therefore, think that Chicago and North Western Railway Company's motion for a directed verdict in its favor offered at the close of the plaintiff's evidence, and again at the close of all the evidence, was well taken, and should have been granted. So, while I find that the jury's verdict, [fol. 579] rightly construed, means they found in favor of the defendant Chicago and North Western Railway Company, I also believe that the defendant, Chicago and North Western Railway Company, was entitled to a judgment in its favor as a matter of law, and that its motion for judgment in its favor on the verdict, so construed, should be granted on two grounds: one, that the verdict, rightly construed, was in its favor and, secondly, the motion treated also as a motion for judgment notwithstanding the verdict, is good and North Western is entitled to have it sustained as such, for it was entitled to judgment in its favor as a matter of law.

3. Now I go to the Union Pacific. Now, as to the defendant Union Pacific Railroad Company, it too has filed herein, within ten days of the rendition of jury's verdict, and entry of judgement thereon, which was on the 19th day of October, 1955, a motion, served and filed herein on the 28th of October, 1955, in which, like the North Western, it prays for an order of the Court to amend the verdict and to alter or amend the judgment.

Now, I have fully treated, in what I have earlier said, with how I think the verdict of the jury ought to be construed. I think that the verdict of the jury, by necessary implication, means a finding by the jury in favor of the defendant Union Pacific Railroad Company, and I so construe it. But, I also believe, and find, that there was no evidence whatever adduced by the plaintiff in the trial of the case, of any negligence by the Union Pacific Railroad Company that caused or contributed to cause any defect in the car in question, or plaintiff's injuries therefrom, and that, therefore, there was a complete failure, on the part of plaintiff, to make a submissible case against the defendant, Union Pacific Railroad Company.

In very truth, plaintiff [conceeds] he did not have any proof of negligence on the part of Union Pacific, and the argument here made by the Rock Island for holding the Union Pacific Railroad Company, is not factual controversial, for the facts on which it rests, were all agreed, [fol. 580] and the question it presents is one of law. That argument is that under the rules in evidence and the per diem contract, or whatever it is properly called, the Union Pacific Railroad Company, upon becoming the outbound line carrier of the car of corn loaded into that car, became retroactively liable—not just for the rent on the car from the time it was spotted at Kansas Grain Company on February 9, but also for the condition of the car and any defects therein, and had an obligation to repair and remedy them from that time: Though the accident happened the afternoon of February 10th, 1953, the defendant, Union Pacific Railroad Company, had no way to know, and did not know, that that car ultimately was to be billed out over its line until the next day, February 11th, 1953, and, as a matter of law, the Union Pacific Railroad Company had no duty to make repairs to a car that it did not have possession of, or any knowledge that it would deliver or transport. And, therefore, there being no factual basis—no evidence at all of negligence in fact on the part of the Union Pacific Railroad Company—there was nothing factual to submit to the jury as to the Union Pacific Railroad Company, and the legal basis of reasoning upon which Rock Island would impose liability on Union Pacific Railroad Company being defective and faulty, in my view, it follows that the

Union Pacific Railroad Company was entitled, certainly as against the plaintiff, to have its motion for a directed verdict sustained.

And, therefore, the verdict of the jury, treated here and construed as I think it necessarily must be—as an implied finding in favor of the defendant Union Pacific Railroad Company—and there being no basis in the evidence or the law upon which to rest any verdict or judgment in favor of the plaintiff against the Union Pacific Railroad Company, the latter's motion to amend the verdict and judgment under Rule 59(e), and, treated also as a motion for judgment in its favor notwithstanding the verdict, ought to be sustained, and judgment entered in its favor, for it [fol. 581] was entitled to judgment in its favor as a matter of law.

Now, therefore, It Is Ordered and Adjudged by the Court, upon numbered parts 2 and 3 hereof, that the Clerk be, and he is hereby, directed to amend, this date, the judgment herein to include a judgment against the plaintiff, Williams, and in favor of the defendants Chicago and North Western Railway Company and Union Pacific Company, upon the issues heretofore tried and submitted to, and determined by, the jury, namely, the issues heretofore existing between the plaintiff, on the one hand, and the three defendants, on the other.

4. It must be understood that upon all these issues thus far discussed we are talking only about the issues in the case that were tried before, and that were submitted to, and determined by, the jury—that is, to-wit: the issues between the plaintiff, Williams, and three defendants, which leaves still pending and open for trial the issues between the several railroad defendants upon their respective cross claims as adversary co-defendants.

Done Aug. 13th, 1956.

CHARLES E. WHITTAKER,
United States Circuit Judge.
(By Assignment)

[fol. 582] (Proceedings on Hearing Cross-Claims of Defendant, Chicago, Rock Island and Pacific Railroad Company against Defendant, Union Pacific Railroad Company and Chicago and Northwestern Railway Company.)

The Court: I am now ready to hear the issues made by the pleadings between these three railroad defendants as adversary co-defendants, and I make this suggestion: It seems to me that the issues are ones of law and they exist really only with respect to a dispute between Rock Island and Union Pacific. Now possibly that isn't so but it occurs to me that Mr. Howland can state in the record what his witnesses would testify to and possibly the other defendants would agree and we can rule the matter as a question of law. We will now have a ten-minute recess.

(Whereupon a ten-minute recess was taken. At the conclusion of the recess, the following proceedings were had.)

The Court: Well now, I am inclined to disagree. No case made by plaintiff, as against defendant Union Pacific, or Northwestern, true, but Rock Island says that by virtue of the law, and by virtue of the rules referred to by its counsel, they, having been held liable, are entitled to indemnity from Union Pacific. I don't think they make that claim at least not seriously, against Northwestern, but it is in the record, and I think they are entitled to a hearing upon that.

Mr. Anderson: My only point, your honor, was this—the way the Court has just put that would be a situation where, as the Court well knows, on railroads we even require a shipper to enter into an indemnity contract. Now that is not what he has plead here. He has said that with respect to this car under the facts set forth, Union Pacific Railroad was and is primarily liable to the plaintiff and primarily responsible, and it seeks indemnity on the theory that if it is liable to the plaintiff—

The Court: If the Rock Island is liable to the plaintiff?

Mr. Anderson: If Rock Island is liable to plaintiff it was only secondarily liable. All right. In order to proceed on that theory there must have been a finding by the jury that we were liable. Now the Rock Island all through the case

has done its best to have a jury verdict come out against more than itself, so that its cross claim would fit this situation, and it hasn't got that kind of a set up. So with all due deference to everybody, I think they have no basis now for proceeding on their cross claim. They are entirely outside their issues.

The Court: What do you say Mr. Howland?

Mr. Howland: First, I say with respect to Chicago and Northwestern, our cross claim is predicated upon a contractual arrangement, and that we are entitled to be heard, and to introduce our evidence on that phase of the case. Now with respect to Union Pacific, as your honor has pointed out, we urge and we request in our cross claim against Union Pacific a claim that under the law the liability of some one to plaintiff for his injuries is the liability of Union Pacific and not that of Rock Island. We urge that the Union Pacific, by virtue of a contractual liability, as well as a liability imposed by law, is under obligation to protect, and upon payment of the judgment we are entitled to judgment over against Union Pacific.

The Court: In other words you say you are entitled to indemnity from Union Pacific by virtue of the contract and the law?

Mr. Howland: That is right.

The Court: All right. Now I am going to hear you on that.

• • • Now, is it not true, Mr. Howland, that you have in your earlier argument stated your basis for contending that the Union Pacific is liable, namely that upon the ad-

mitted facts that the Union Pacific became the outbound line-haul carrier of the loaded car of corn, that it, under the rules and the law you mentioned, became retroactively liable for defects and consequences thereof in the car from the time the car was spotted at Kansas Grain Company for loading.

Mr. Howland: Or at least from the time the loading commenced.

The Court: All right. Now that is your position. • • • I suggest you proceed to put in that evidence which you have and want to put in tending to support your basis for that legal contention of indemnity from Union Pacific. There is no dispute about the factual basis, as I understand it, for it is admitted half a dozen different ways in this file, alleged by Union Pacific, admitted by Rock Island, that this car was ordered by the Grain Company from Rock Island January 28, 1953, thirty-five cars in all, fourteen of which had been delivered prior to February 7. The evening of February 9, the offending car and two others were set out by the Rock Island on the Seventeenth Street connection to be there picked up and switched by Northwestern over the River Track, owned and operated by Northwestern, to the Grain Company; that sometime between 5 and 11 p.m. the evening and night of February 9 Northwestern did so switch the car and spot it at Kansas Grain Company. On the next day, February 10, 1953, the car was loaded by Kansas Grain Company with shelled corn. At about 4:45 that evening, a sample having been taken of the contents of the car for analysis purposes at Omaha Exchange, employees of Kan- [fol. 584] sas Grain Company, including plaintiff Williams, were directed to close the door and seal the car, and while attempting to do so the car door fell off on to Williams and hurt him. The next morning, the eleventh of February, the Omaha Exchange had graded the sample from the car, had found it to contain No. 2 yellow corn, and reported that fact to the Omaha office of Kansas Grain Company, which in turn telephoned the elevator of the Kansas Grain Company in Council Bluffs and told them to prepare a bill of lading, shipping that car to its own order in Denver, notifying consignee by way of Union Pacific. The car was

not immediately delivered to Union Pacific in accordance with the bill of lading but was recalled and taken into custody by Rock Island and Northwestern to Rock Island repair tracks where it was held for repair until the 23rd of February. On the 23rd day of February, the car never having meanwhile been unloaded was switched to and delivered to Union Pacific and a waybill was then presented to Union Pacific and the car then moved forward to Denver.

Mr. Howland: Of course, the Union Pacific makes its own waybill. It was merely a switch list that was presented or interchange list.

The Court: All right, maybe so, but those were the facts. Now the Rock Island contends on the basis of certain rules and per diem agreements, and the law that Union Pacific by reason of the fact that it became the outbound carrier of the shipment became retroactively liable not only for rent on the car from the time it was spotted, or loading commenced, at the Kansas Grain Company, but also legally liable for any injuries caused by a defective condition of the car from that time, including injuries to the plaintiff. Now, whatever documents you have that you want to offer in [fol. 585] support of that theory you may now offer:

Mr. Howland: I think that will shorten the proof that we will require.

It is conceded by counsel for Union Pacific that defendant Rock Island's Exhibit 15, Circular No. T-225, Association of American Railroads, Code of Car Service Rules, and Code of Per Diem Rules, in effect January 1, 1953, is authentic and that both the Union Pacific and Rock Island were members of the Association of American Railroads on February 10, 1953.

Defendant Rock Island offers and introduces in evidence Rock Island Exhibit 15.

The material portions of Defendant Rock Island Exhibit 15 are reproduced as follows:

Note

The following pages are on Card 6.

421	427
423	429
425	431

The even-numbered pages are blank.

[fol. 592] Mr. Anderson: I want to have a general objection to all of this evidence with respect to car per diem rules, car service rules, as immaterial and irrelevant.

The Court: Well, I understood that was your position, but let this exhibit be received.

Mr. Howland: I wish to call attention specifically to the terms of the Car Service and Per Diem Agreement set forth at the first four paragraphs on page 2 of Exhibit 15 to the definitions of "home car," "foreign car," "home," "home road," "home junction," "subscriber," and "non-subscriber," appearing immediately thereafter; to Rule 1 of the Car Service Rules, "freight," Rule 2 appearing on page 2. Rule 6 appearing on page 3. Rule 7 appearing on page 3, and the Code of Per Diem Rules, "freight" appearing on page 6, the following rules: 1, 2, 3, 4, 5, including the interpretations embraced in rules 4 and 5. Rule 5 continued with interpretations appearing on page 8, and the provisions of Circular No. 2-T-199, appearing on page 14 of Rock Island [fol. 593] Exhibit 15, set forth there as Rules 1, 2, 3, 4, 5 and 6.

Mr. Anderson: I want to make one further specific objection to Rule 4 now offered in the first column on Page 14 for the reason that there is no showing, and as I understand it under the fact it is not applicable to the situation involved at Kansas Grain Company's industry.

The Court: I will reserve ruling on the objection.

Mr. Howland: Mr. Anderson, may I inquire if it can be conceded that the defendant Rock Island Exhibit 22 just marked by the reporter, being a photostatic copy of Circular No. T-71 issued over the signature of L. R. Knott, Secretary, dated May 31, 1939 is a photostatic copy of the original document and that the same may be received without further identification and with the same force and effect as the original?

Mr. Anderson: Yes, I will stipulate that it may be received in lieu of the original.

[fol. 605] The Witness: Page 45 of Exhibit Rock Island 23 shows the prevailing switching charge for movement from the elevator of Kansas Grain Company of loaded cars of grain outbound to connections with line-haul railroads at a basic rate of $2.48. That has been subject to various increases under Interstate Commerce Commission proceedings since July 1, 1946.

Defendant Rock Island Exhibit 24 and particularly Sheet 38 thereof is the tariff covering the absorption by the Union Pacific Railroad of inbound and outbound switching charges of other lines at Council Bluffs, Iowa. That is the tariff which governed such absorption rules of Union Pacific Railroad during the month of February, 1953.

Mr. Howland: At this time we offer and introduce in evidence Rock Island Exhibit 24, Sheet 38 thereof.

Defendant Rock Island Exhibit 24 is reproduced as follows:

[fol. 606] Defendant Rock Island Exhibit 24
M.D.J. 8/13/56
Page 38

U. P. R. R. Tariff No. 105-L

Section 2.

Item No.	Absorptions
	Inbound Switching Charges on Transit Grain.
	Refund of in-bound switching charges authorized in connection with out-bound shipments of grain or its products, or other products on which grain or grain product rates are authorized shall be made only when there has been shipped over UP an amount equal to 90 per cent in weight or more of the in-bound tonnage shown by freight bill surrendered.
	The proper observance of the above rule will be

665 subject to verification by the Western Weighing

& Inspection Bureau, and before refund of inbound charges is made the Western Weighing & Inspection Bureau shall certify that the conditions of the rule have been observed; except shipments reshipped in the original car, when any documentary evidence which will substantiate the claim may be used by the shipper.

Will not apply on Kansas or Nebraska Intrastate traffic.

See Item 670.

Exception to the General Absorption Rules

At stations named in Items 685 to 785 switching charges will be absorbed in accordance with the general absorption rules (See Items 640 and 645) except that the specific provisions published in Items 685 to 785 on certain traffic will supersede
670 the general absorption rules on such traffic.

The absorption rules published in Items 640 to 785 will not apply in connection with any items in U. P. R. R. Tariff No. 171 G, I. C. C. No. 5269, which contain specific provisions in regard to absorption of switching charges. Such specific provisions will supersede the absorption rules published in Items 640 to 785.

Council Bluffs, Iowa

(a) Inbound—On Grain originating west of the Missouri River (see Item 20) moving into elevators or mills on connecting lines, no absorptions will be made.

(b) Outbound — On Grain, Grain Products, Seeds, Alfalfa Feed or Meal, the UP will absorb switching and other charges accruing at or between Council Bluffs, Iowa, Omaha or South Omaha, Neb., when moving out over its rails, destined to stations Denver, Colo., to Speer, Wyo., (Index Nos. 1180 to 1342), or Cheyenne, Wyo.,

(Index No. 628), as shown in U. P. R. R. Tariff No. 4000, I. C. C. No. 5113, or to points beyond; also when destined to Leavenworth, Kan., St. Joseph and Kansas City, Mo., or to points beyond, or to points beyond Topeka, Manhattan or Junction City, Kan., when routed via the UP to those junctions also stations on the UP in Kansas, Nebraska and Colorado (except Index Nos. 1180 to 1388 as shown in U. P. R. R. Tariff No. 4000, I. C. C. No. 5113) to which the rate from Council Bluffs, Ia., Omaha or South Omaha, Neb., is not less than 15½ cents per 100 pounds, as follows (See Exceptions):

(1) Switching charges of connecting lines as per current tariffs lawfully on file with the Interstate Commerce Commission.

(2) Switching charges of the UP as published in this tariff.

(3) Charges made for movement between Council Bluffs, Iowa, Omaha or South Omaha, Neb.,
685 as per current tariffs lawfully on file with the Interstate Commerce Commission.

(c) The UP will not absorb switching or stock yard charges at Missouri River (See Item 20) stock yards on Live Stock; including Live Stock with Emigrant Movables, stopped at Missouri River (See Item 20) stock yards for inspection account State or Federal regulations.

(d) Absorption of switching charges of the C&NW on traffic other than Grain, Grain Products, Seeds, Alfalfa Feed or Meal, switched to or from industries located within the Fourth District at Omaha, Neb., as described in C&NW G. F. O. No. 8419-L, I. C. C. No. 11049, must not be in excess of $9.28 per car.

Exceptions.

Exception No. 1.—Absorptions of Union Stock Yards Co. switching charges accruing at South

Omaha, Neb., must not be in excess of those provided for in Item 775.

Exception No. 2 — Absorption of switching charges on the C&NW on cars switched to or from industries located within the Fourth District at Omaha, Neb., as described in C&NW G. F. O. No. 8419-I, I. C. C. No. 11049, must not be in excess of the following:

On Grain, Grain Products, Seeds, Alfalfa Feed or Meal, the UP will absorb $6.75 per car on inbound shipments provided the outbound movement is via the UP in which event $6.75 per car will be absorbed on on the outbound movement.

See Item 670.

[fol. 607] Mr. Anderson: Defendant Union Pacific objects on the ground that it is irrelevant and immaterial.

The Court: I am sure it is, but I am going to receive it.

The Witness: There is a reference to reciprocal switching districts or reciprocal switching in this tariff. I am familiar with the meaning of that term as used in railroad transportation matters.

Q. I notice in these tariffs there is a reference to reciprocal switching district or districts. Are you familiar with that term as used in transportation matters?

A. Yes, sir.

Q. Will you explain it to the court?

A. Well, reciprocal switching applies to limited areas and the charge for such switching is not intended to cover actual cost and is an arrangement whereby you have reciprocity between the railroads in that area.

Q. Well, what is the effect of it with respect to the ability of any railroad line within the switching district to reach a particular industry that is covered by a reciprocal switching tariff?

A. It is intended to enable the line haul carrier to reach any industry by means of this reciprocal arrangement.

I believe the best explanation of reciprocal switching arrangement is an excerpt from a decision of the Interstate Commerce Commission which is rather brief taken from 232 I.C.C. 795 which reads as follows:

"Reciprocal switching is the service which carriers perform for each other within a switching district or other defined area in connection with which service the switching carrier does not receive a line-haul. The effect of reciprocal switching is to extend the rails of the line-haul carrier

to all designated tracks within the area. Reciprocal switching charges generally are made without regard to cost of service, and may not accurately measure a maximum reasonable charge for such service. Such charges are absorbed in many instances by the line-haul carrier."

Mr. Anderson: Defendant Union Pacific Railroad Co. moves to strike the answer of this witness in that it is not responsive. It is incompetent, it is irrelevant and immaterial.

[fol. 608] The Court: I am sure it is. Let the objection be sustained. It is in the record now.

The Witness: As applied to the movement of a car from an industry on the Rock Island Railroad and connected to the Rock Island Railroad in Council Bluffs, Iowa, which is billed out on the line of the Union Pacific Railroad, the basic reciprocal switching tariff would be $2.48 subject to the increases, and the outbound road-haul carrier would repay that amount to the Rock Island Railroad. That charge is absorbed by the line-haul carrier; it is not paid by the shipper as a part of the transportation charge.

Q. You have referred a moment ago to the fact that there were two classes of rates shown on the Rock Island tariff identified as Rock Island Exhibit 23. One is referred to as Group "A" rates and the other Group "B" rates. Will you explain the difference on those rates and the charges, and the reason therefor.

A. The group —

Mr. Anderson: I object to that as immaterial and irrelevant.

The Court: I think it is. But can you do it briefly, Mr. Christiansen?

The Witness: Yes, sir.

The Court: All right, do it quickly, please.

A. Group "A" covers reciprocal switching, and it is the charge of $2.48 which has been referred to. That is dollars and cents per car. Group "B" cars are an inter-

terminal switching, which does not apply in connection with a line-haul movement. It is a point to point movement within the switching district, and the rates are considerably higher for that type of a movement.

Q. Although the service performed may be substantially identical?

[fol. 609] A. That's true.

ELMER SMITH called and sworn on behalf of C.R.I.&P.R.R. Co. testified as follows:

Direct Examination.

By Mr. Howland:

I live in Omaha, Nebraska, and am local Freight Agent for the Chicago, Rock Island and Pacific Railroad in Council Bluffs and Omaha. I have occupied that position for the past six and one-half years. I am in charge of the local freight operations, and freight offices, both at Omaha and Council Bluffs. I have clerks under my supervision in both of these places. I am familiar with the location of the [fol. 610] track known as River Track in Council Bluffs and also the so-called "pool yard" in Council Bluffs. The pool yard is the place where all railroads deliver cars to other railroads; it is a pool operation. The Rock Island Road customarily delivers to or receives cars from the Union Pacific at this pool yard in Council Bluffs. The pool yard is located approximately one mile from the River Track in Council Bluffs but there is a connection to the pool yard and the lead to the River Track is a matter of a block and a half or two blocks away.

I am familiar with the method of handling cars inbound and outbound to industries located on, or served by sidings connecting with the River Track and particularly the Kansas Grain Company. That elevator was formerly called the Butler-Welsh Elevator and is currently known as the Kansas Grain Elevator. A per diem charge is a rental charge for use of a car per day.

Q. Just explain how that per diem charge is reported and how you make the per diem report, who makes it and how it is handled.

Mr. Anderson: Of course, your honor, these documents here presumably speak for themself. We put in the documents and put in the evidence to the court to explain it.

Mr. Howland: To explain the way in which they are handled here in Council Bluffs.

The Court: Well, all right. Make it brief, now. I want you to put it in, but you are taking a great deal of time. Go ahead and answer the question.

A. The per diem is a stipulated charge and on the River Track if the car is taken in by one of three roads—the Rock Island, C. B. & Q., or the Northwestern and is loaded out [fol. 611] over another line, it is interchanged at the time the car is placed, or is constructively placed, for loading.

Mr. Anderson: I move to strike the words "constructively placed" as being a conclusion of the witness.

Mr. Howland: Well, let's let that go out.

The Court: All right, sustained. Go ahead.

The Witness: Any foreign car is placed on a per diem report if it is not in your local account. If it is handled for anyone else's road-haul service then it becomes a per diem car to the local railroad.

Q. All right, and that is a charge for the car made when it is in the possession of a line other than the line which owns it? A. That is right, sir.

Q. And that is true whether it be in possession as a switching carrier, or in connection with a line haul movement, or loaded or empty?

A. It definitely is correct if it is in the phase of a switching movement.

The River Track is a joint track. If we take an empty car to an industry on order and it is not loaded out on our line and is loaded out on either C.B.&Q. or Northwestern, we make an interchange report on the respective load at the time the car is placed for loading.

The Court: Suppose you don't know at the time it is placed what line it is going out on, what do you do?

The Witness: The evidence will appear what line it does move out on by switch orders, and therefore we can hold our interchange report in abeyance long enough, or otherwise we can make a correction to the report and keep our records straight.

The Court: You hold your interchange reports in abeyance until the car is billed out and you do know?

The Witness: Not at all times.

The Court: But in those cases when you do not know, don't you hold it in abeyance?

[fol. 612] The Witness: We make a correction in our interchange report and later correct the record.

The Witness: (Continuing) In cases where cars are going out to roads other than the two aforementioned, then it [fol. 613] is handled on a reciprocal basis and an arbitrary basis. If you have a car that has been delivered to the River Track by either the Chicago and Northwestern, the Chicago, Rock Island or the C. B. & Q. and it moves out on the line of Union Pacific Railroad for Denver, Colorado, there is an arbitrary rate sheet, so set for so many days, to apply against each car on any one of the other roads. Now, I think you will find that it is three point eleven or three point twenty-eight days. I can't remember without referring to the sheet.

Defendant Rock Island's Exhibit 16 is the Council Bluffs, Omaha and South Omaha Per Diem and Reclaim Association Rules and Regulations under which the furnishing of, the reporting of, and the handling of cars to all industries and to connections in this terminal is covered.

It is conceded that Defendant Rock Island Exhibit 16 is a copy of the code of rules referred to and was effective February, 1953.

Mr. Howland: I will offer Defendant Rock Island Exhibit 16.

Mr. Anderson: Objected to on the ground that it is irrelevant and immaterial.

The Court: Well, all right, it may be but it will be received.

[fol. 614] Defendant Rock Island Exhibit 16.

Defendant Rock Island Exhibit 16 is a booklet of thirty-three pages with cover. Pages are approximately eight inches by six inches. The cover bears the following

The Council Bluffs-Omaha-South Omaha
Per Diem and Reclaim Association
Organized at Omaha November 22nd, 1923

Code of Reclaim Rules
To Govern The Settlement of Per Diem Reclaims
Between Member Roads

The first seven pages of the Exhibit (1 to 7 inclusive) contain Articles of Organization and a list of member railroads which includes "Union Pacific" "Rock Island" and "Northwestern."

Page 8

Code of Switching Reclaim Rules to Govern the
Settlement of Per Diem Reclaims in the
Council Bluffs-Omaha-South Omaha Switching District

Definitions.

Switching Roads, Carrier Roads, Switching Service, and Trap or Ferry Cars, are defined as follows:

Terminal Switching Road

A terminal switching road is a road on whose rails, or on private tracks connecting therewith:

(a) A car, including a trap or ferry car, received from a carrier road, either direct or through an intermediate road, is unloaded, reconsigned or reshipped.

(b) A car, including a trap or ferry car, is loaded, reconsigned or reshipped, and delivered to a carrier road, either direct or through an intermediate road.

The service performed being within the designated switching limits and at a switching charge.

Intermediate Switching Road

An intermediate switching road is a road handling a car, including a trap or ferry car, from one railroad, steamship, ferry or barge line, to another railroad, steamship, ferry or barge line, within the designated switching limits, (the car not being loaded or unloaded on the intermediate switching road), such road performing the service not participating in the freight rate.

Carrier Road

A carrier road is:

(a) A road which, participating in the freight rate or which handles its own company material in road haul on the inbound shipment, delivers a car, including a trap or ferry car, to a terminal switching road, either direct or through an intermediate switching road, for unloading, reconsigning or reshipping.

(b) A road which, participating in the freight rate or which handles its own company material in road haul on the outbound shipment, receives a car, including a trap or ferry car, from a terminal switching road, either direct or through an intermediate switching road, that has been loaded, reconsigned or reshipped by the terminal switching road.

Terminal Switching Service

The service performed by a terminal switching road, as defined in these rules.

Intermediate Switching Service

The service performed by an intermediate switching road, as defined in these rules.

Note: An empty car returned in home route to a switching road, previously loaded, reconsigned or reshipped in terminal switching service by such road, which is then delivered empty to another road within the same switching

district, will not be considered as handled in intermediate switching service.

Inter-Terminal Switching Service

The service performed in handling a car, except a trap or ferry car, which has been loaded or reshipped within the switching limits on one road for unloading or reshipping within the same switching limits on another road and at a switching charge.

[fol. 617] Page 11

Resolved, That changing the present publication of switching rates between Council Bluffs, Omaha and South Omaha, from switching tariffs to line haul tariffs will not affect the present practice of per diem reclaim settlement so long as the rates continue the same, except for general change therein. (Adopted January 21, 1947.)

Trap or Ferry Car

A car, containing less than carload freight (including cotton), destined or originating beyond the switching limits of station at which loaded or unloaded on a switching road, the contents of which may or may not have been rehandled wholly or in part at freight house or platform located on carrier road within the switching limits of the station at which car is received from or delivered to the switching road.

[fol. 618] Page 12

Rules

Rule 1. Terminal Reclaim Allowance

Sec. 1. The carrier road will allow the terminal switching road the established per diem reclaim arbitrary at the current per diem rate on each car handled in terminal switching service, except as provided in sections 2 and 3.

Sec. 2. On cars loaded with live stock (not including emigrant movables or exhibition live stock, which are subject to Sec. 1, or through shipments of live stock unloaded on a switching line for feed and rest, which are subject to Sec. 2.), switching road may reclaim for the actual per diem paid, with a maximum of one day on any one car, but no reclaim will be allowed on diverted or pick-up cars

loaded with live stock, except emigrant movables and exhibition live stock.

Live stock reclaims must show initials and numbers of cars, date received, date delivered, and actual detention with a maximum of one (1) day on any one car.

This will also apply to cars of live stock received for unloading which, when empty, are delivered to the home road, either direct or through an intermediate switching road.

Cars in live stock service handled through an intermediate switching road, to or from a terminal switching road, will be considered as round trip when returned.

[fol. 619] Page 15.

Sec. 5. In case a car is handled in intermediate switching service by more than one road, the inbound carrier road shall pay to each intermediate switching road and intermediate reclaim in accordance with Section 1 of this rule. The carrier road shall reimburse the terminal switching road for all intermediate reclaims which it is required to pay under Section 2 of this rule.

Note: Each intermediate switching road will reclaim directly from road haul carrier or terminal switching road from which the first intermediate switching road receives the car.

Rule 3. Reclaim Restrictions

No reclaim shall be allowed for an inter-terminal switching movement. These rules apply only to cars subject to per diem basis of settlement, including cars owned by the switching road, except they shall not apply to cars loaded with company material (including grain doors moving on instructions of W.W.I.B. and company coal) for use of the switching road or any of its subsidiaries.

Rule 4. Empty Cars Rejected By Shipper

When a car is delivered empty to a switching road for return loading and is returned empty to carrier road by reason of shipper's cancellation of order or rejection by shipper because unsuitable for loading as specified by the

switching road when received from the carrier road, the switching road may reclaim against the carrier road, for an amount at the established per diem rate accruing from receipt of car to its return, but not to exceed three (3) days.

Note: Car rejected by joint inspection at industries or on track adjacent thereto account of being unsuitable for specified loading will be considered as rejected by shipper.

Rule 5. Collection Of Switching Charges

The right of reclaim is not affected by the fact that in switching service the switching road may collect its charges from the shipper or consignee, or when switching charge is assessed on cents per cwt., instead of car basis.

Rule 6. Delays Due To Railroad Error

Sec. 1.(a) Whereas Car Service Rule 7 provides that delivery is not complete unless a car is accompanied or preceded by proper data for forwarding, it is understood and agreed that when a car is receipted for without the proper data for forwarding, the receiving road shall notify the delivering road either by telegraph, by messenger in writing, or by telephone confirmed in writing,

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[fol. 621] The Witness: If a car is brought to the River Track empty and billed out over the Union Pacific in line-haul service the car would be switched by the Chicago and Northwestern and spotted at the industry and would then be loaded and billed out at some time. After billed out over the Union Pacific, the elevator would give a switching order to the River Track Clerk and he in turn would have this car switched to the respective roads handling the car. If we were the switch carrier in the instance in which you mentioned, we would pick the car up at 25th Street with a Rock Island switch engine and take it to the Union Pacific at the pool yard. Through the check of that car fur-[fol. 622] nished by the Joint River Checker Track we would enter it on a reciprocal switching report, also shown on a line on that report, claiming a reciprocal arbitrary reclaim. Instead of making our interchange report and

perhaps holding the interchange or correcting it in the event the car moved to a line off the River Track, we would make this arbitrary per diem reclaim against the line to which the car was delivered.

At the River Track, we have a joint car checker that keeps the necessary records and protects those movements to and from those industries down there.

Q. Does the Western Weighing and Inspection Bureau maintain any railroad representative there?

A. They do to the degree of coopering the grain cars that serve the industries on that line.

Q. Well, what is the fact as to whether there is a Western Weighing and Inspection Bureau man there for the purpose of placing grain doors and similar service to the industries?

A. That is right.

Q. And the Western Weighing and Inspection Bureau is an organization that is maintained by all of the railroads, as I understand it. Am I correct?

A. Yes, sir.

Q. And when a car goes from the Rock Island to the Burlington or the Northwestern down there what does the Western Weighing and Inspection Bureau man have to do with it before it is loaded with grain?

A. Merely the coopering the cars.

[fol. 623] What do you mean by coopering? Explain that.

A. Placing of the grain doors in the cars.

Q. And the final preparation for loading?

A. That is right, sir.

Q. Now, does it sometimes occur with more or less frequency that a car will be sent to the River Track by one railroad and will be loaded out by another?

A. Yes, sir.

The Court: When you say "loaded out" you mean—

Mr. Howland: Ship out, bill out.

The Court: Carried out by some other carrier as a line-haul carrier?

Mr. Howland: That is correct.

Q. Have you made recently any check of the movement of cars in and out over that track from the Kansas Grain Company for the purpose of determining the number of cars in a three-month period beginning in December, 1952 and terminating in February, 1953, to determine the number of cars furnished by for instance, the Rock Island, the number it got back loaded?

A. I have, yes, sir.

Q. Have you also made a similar tabulation showing the empty cars supplied by other lines, and the number for the months of January and February, and the lines over which they were billed out in out-bound line haul service?

A. Not in its entirety. A check was made to determine the number of empties that the Rock Island placed for loading at Kansas Grain over the period mentioned, and over which roads that those empties were moved out over under load. A check was made as to the number of loads that had road-haul service on from Kansas Grain over the period mentioned, and where those empties came from. As far as checking to the empties supplied by other roads that moved out over other roads, I didn't have such records available.

[fol. 624] A check was made to determine the number of empties that the Rock Island placed for loading at Kansas Grain over the three-month period mentioned and over which roads those empties were moved out under load. A check was made as to the number of loads that had road-haul service over the period mentioned and where those empties came from. As far as checking the empties supplied by other roads, I didn't have such records available. The exhibit consisting of four sheets headed "Empty Grain Cars Furnished Kansas Grain Company, Council Bluffs, Iowa, by the C.R.I.&P.R.R. Co., December, 1952 — January, 1953 and February, 1953" shows the total number of empties furnished by the Rock Island to Kansas Grain

Company for each of those three months. Defendant Rock Island offers Rock Island Exhibit 25 in evidence.

Mr. Anderson: Defendant Union Pacific objects on the ground that it is immaterial and irrelevant.

The Court: I am sure it is, and I have been patient now about as long as I am going to be. Now, I want to say furthermore, we are going to finish this case tonight. I say this hasn't any relevancy to the case at all, but I am going to let you receive it in evidence. But I do want you not to abuse me now. Now, go ahead and get through, please.

Mr. Howland: I realize I am trying the patience of the court, but I am trying to make a record and I will be as brief as I can.

[fol. 625] Defendant Rock Island Exhibit 25 is as follows:

Defendant Rock Island Exhibit 25.

The first sheet of Defendant Rock Island Exhibit 25 is as follows:

Recap.

Empty grain cars furnished Kansas Grain Co., Council Bluffs, Iowa, by C.R.I.&P.R.R. Co. December, 1952, January and February, 1953. Released for movement out on following lines:

Month	Total Cars	CRI&P	CB&Q	UP	MP	C&NW	WAB
December, 1952	8	0	5	3	0	0	0
January, 1953	33	15	4	5	10	0	1
February, 1953	27	1	5	5	16	0	0
	70	16	14	13	26	0	1

Other sheets of the Exhibit contain detailed lists of car numbers.

The Witness: In the month of December, 1952, as shown by the exhibit, No. 25, the Rock Island supplied eight empty cars to Kansas Grain Company and received outbound billing on none of those cars. In January, 1953, it furnished

thirty-five cars and received outbound billing on fifteen of [fol. 626] them. In February, 1953, we furnished twenty-seven empty cars and received billing one one of those cars. Rock Island Exhibit 26 is a report of outbound loads billed by Kansas Grain Company during January and February, 1953, and shows the empty cars which were furnished by other lines empty but billed on the Rock Island.

Rock Island Exhibit 26 is offered in evidence.

Mr. Anderson: Objected to as irrelevant.

The Court: Overruled. Received.

Def's R.I. Exhibit 26 Recap.

M.J.D. 8/13/56

Outbound loads billed by Kansas Grain Co., Council Bluffs, Iowa, moved via C.R.I.&P.R.R. Co., January and February, 1953:

Month	Total Cars	MILW.	CB&Q	U.P	Mo.P.	C&NW	WAB.
January, 1953	30	9	14	1	0	3	3
February, 1953	21	2	5	8	1	5	0
Total	51	11	19	9	1	8	3

Other sheets of the Exhibit contain detailed lists of car numbers.

[fol. 627] The Witness: In the month of January, 1953, the Rock Island had thirty cars outbound billed over its line. Of those cars, nine were furnished empty by the Milwaukee, fourteen by the C. B. & Q., one by the Union Pacific, three by the Chicago, Northwestern and three by the Wabash.

The date of billing is the date that the Joint River Track Clerk shows on his report to the respective roads that the car was to move out; for instance Rock Island car 145287 is shown billed out on February 11; that does not refer to the date of loading; it refers to the date that it is released. During this period in 1953, and immediately prior thereto, Kansas Grain Company pooled all their empty cars. Rock Island Exhibits 25 and 26 are taken from the original records of the Joint Checker kept in the usual course of business.

JAMES K. FRANKS, called and sworn on behalf of C.R.I.&P.R.R.Co., testified as follows

Direct Examination.

By Mr. Howland:

I live in Omaha, Nebraska, and am traffic manager for the [fol. 628] Kansas Grain Company. The Kansas Grain Office in Omaha is at 17th and Harney Streets. It also operates an elevator at Council Bluffs, with respect to which I keep the records and direct the routing of traffic. I have the numbers of the cars which were loaded at the Kansas Grain

elevator in Council Bluffs on February 10, 1953 and I also have the outbound billing on the days those cars moved out. There were five cars of corn and one car of oats loaded on February 10, 1953. Of the cars loaded that day, there was one car of oats that moved out on the Rock Island Railroad. No cars of corn were billed out on the Rock Island that were loaded that day at any time. There were three cars of No. 2 corn billed to Sikeston, Missouri, a point on the Missouri Pacific Railroad; one car of corn was billed out on the Missouri Pacific to Little Rock, Arkansas, and one car to Denver on the Union Pacific. The car to Denver on the Union Pacific was Rock Island 145287.

Defendant Rock Island Exhibit "19" is a contract between Houlton Grain Company and Kansas Grain Company for the purchase of ten cars of corn, and defendant Rock Island Exhibit "20" is the confirmation of the order by Kansas Grain.

Defendant Rock Island offers and introduces in evidence its Exhibits "19" and "20".

Mr. Anderson: We make no objections that they are photostatic copies of originals but we object to each exhibit separately and individually as being irrelevant and immaterial and in no way binding upon defendant Union Pacific.

The Court: Let them be received.

[fol. 629] Defendant Rock Island Exhibits 19 and 20 are as follows:

Note:

Page 465 is on Card 6, lower right; Page 466 is blank; Page 467 is at start of Card 9. Page 468 is blank.

[fol. 631] It is conceded by counsel for CRI&P R.R. Co. and C&NW Ry. Co. that defendant Rock Island Exhibit "27" is a photostatic copy of contract between C&NW Ry. Co., CB&Q.R.R.Co. and the CRI&P.R.R.Co. dated as of January 1, 1889, pertaining to the operation of the River Track in Council Bluffs, and that defendant Rock Island Exhibit "27A" is a photostatic copy of a contract between the same parties entered into December 21, 1910.

Defendant Rock Island offers and introduces into evidence Exhibits "27" and "27A".

Mr. Johnson: We object on the grounds that neither of these are relevant or material to any of the issues between the Rock Island and the Northwestern.

The Court: They will be received.

Defendant Rock Island Exhibit 27 is reproduced as follows:

[fol. 632]

Defendant Rock Island
Exhibit 27
8/13/56 M.J.D.

This Agreement made and entered into this first (1st.) day of January A.D. 1889, by and between the Chicago and North Western Railway Company, hereinafter designated as the "Northwestern Company", party of the first part, the Chicago, Burlington and Quincy Rail Road Company, hereinafter designated as the "Burlington Company", party of the second part, and the Chicago, Rock Island and Pacific Railway Company, hereinafter designated as the "Rock Island Company", party of the third part,

Witnesseth:

That Whereas; The Northwestern Company has heretofore constructed and operated, and now has in use a track in First Avenue in the City of Council Bluffs, extending from a point near Thirteenth Street in said City to the Missouri River, such track being laid in First Avenue a public highway, from its junction with the main track of the said Northwestern Company to the West line of the

Ferry Addition to Council Bluffs, and from thence along and upon lands owned by the said Northwestern Company, to its terminus at the Missouri River, which track is shown upon the tracing hereto attached, marked "Exhibit A", identified by the signature of John E. Blunt, Chief Engineer of said Northwestern Company, which tracing is hereby made a part of this agreement, and is referred to for greater certainty of description.

And Whereas; The said Burlington Company and said Rock Island Company have jointly constructed a track in the said First Avenue from a point near 15th Street to a point near what is commonly known as the "Power House" located between Clark and Smith Streets in said City.

And Whereas; For the purpose of avoiding a needless expenditure for the extension of said last named joint track from its present terminus to the Missouri River the said [fol. 633] Burlington and Rock Island Companies have applied to the said Northwestern Company for permission to connect with and use the tracks of the said Northwestern Company from a point near said "Power House" to the terminus thereof on the Missouri River, and the said Northwestern Company is willing to permist such connection and use to be made upon the terms hereinafter agreed upon.

Now Therefore: Said several parties for and in consideration of the mutual and dependent covenants each with the other herein entered into have agreed and do agree, as follows, to with:

(1) It is mutually understood and agreed that the track or tracks, of the Northwestern Company, first herein described, extending from the point of connection hereinafter designated, to the Missouri River are of the value of Nine thousand four hundred and seventy dollars ($9470.00), that such valuation includes the strip of land owned by the said Northwestern Company upon which such track is laid West of said Ferry Addition, but that the franchise or right to construct and maintain said track in First Avenue is not considered as item in making up such valuation.

(2) The said Northwestern Company agrees that it will permit the said Burlington and Rock Island Companies to connect their present track in said First Avenue with the track of the said Northwestern Company at such convenient point near the present terminus of said joint track, as may be agreed upon by the respective Chief Engineers of the parties hereto, such connection to be made at the cost of the parties hereto each paying one third (1/3) of the actual cost thereof. Such connection shall be made by the said Northwestern Company and bills shall be rendered to said Burlington and Rock Island Companies, respectively, for one third (1/3) each of the cost thereof, and said last two named Companies agree to promptly pay to the said Northwestern Company the amount of the bills so rendered.

[fol. 634] (3) The said Northwestern Company does hereby demise and lease to the said Burlington and Rock Island Companies, severally and not jointly, the right to use the track of the said Northwestern Company from the point of connection aforesaid to the terminus thereof, together with the turnouts and side-tracks now existing co-terminus therewith for the term of ten (10) years from the 1st of January A.D. 1889, for the rental and upon the terms hereinafter specified.

(4) The said Burlington and Rock Island Companies agree each for itself that they will each pay to the said Northwestern Company, for the use of the aforesaid track, interest upon one third (1/3) of the valuation thereof, hereinbefore agreed to, at the rate of six (6) per centum per annum, payable semi-annually at the office of the Comptroller of said Northwestern Company in Chicago, Illinois, and will in addition thereto pay to said Northwestern Company one third (1/3) of the actual cost of the maintenance and repairs of such tracks, bills for the cost of maintenance and repairs to be rendered monthly to each of said two last named Companies and they agree to promptly pay the amount thereof to the said Northwestern Company.

(5) It is further understood and agreed between all of the parties hereto that whenever all of said parties may agree that it is desirable to put in additional side or spur tracks co-terminus with the track which is the subject of

this agreement to facilitate the transaction of business with enterprises or industries located upon this line, or contiguous thereto, such sidings or spur tracks shall be constructed at the joint and equal expense of all of the parties hereto. Such construction shall be done by such one of the parties hereto as may be appointed for that purpose, and such party shall render bills to each of the others for one third (1/3) the actual cost of such side or spur track or tracks and the other parties agree to promptly pay to the [fol. 635] party constructing the same one third (1/3) each of the cost thereof. Such side and spur tracks as shall be constructed during the term of this lease under the provisions of the last foregoing clause shall be maintained and kept in repair by the said Northwestern Company but at the joint and equal expense of the parties hereto in the same manner hereinbefore provided with reference to the track leased.

(6) It is also further understood and agreed that each of the parties hereto shall have the use of any side, or spur tracks that either of the parties may have heretofore put in or may hereafter construct connected or to be connected with either of the said track between 15th Street and the point of connection of said first mentioned tracks; that for the purpose of enabling said parties to make such use of said side and spur tracks connected with said two tracks, or either of them, the said two tracks between the points aforesaid shall be maintained and operated in the manner herein provided for the maintenance and operation of the demised track and of the side and spur tracks connected or to be connected therewith; that is to say each of the parties hereto shall pay one third (1/3) of the cost of the maintenance and repairs of each of said two tracks between the points aforesaid, and the cost of the operation thereof shall be divided in the manner provided in the 9th clause of this agreement.

(7) If at any time during the term of this lease the Northwestern Company shall pay any just or proper claim for damages growing out of its occupation of First Avenue West of the point of connection aforesaid and the portion of its track therein, (except for personal injuries or injur-

ies to property in course of transportation), commonly known as right of way damages, the amount so paid shall be added to the valuation herein agreed upon, upon which interest is to be paid by the said Burlington and Rock Island Companies as aforesaid.

[fol. 636] (8) It is further mutually agreed between the parties hereto that if either of said parties shall elect to acquire land for, and established a depot adjacent to, or that can be conveniently reached from the track hereby demised, for the receipt and discharge of freight or passengers received from or destined to points West of the Missouri River, that such party shall give sixty (60) days notice of such intention to the other parties hereto, and the other parties, or either of them, may join in the construction of such depot at equal expense and the same shall thereafter be maintained and operated as between the Companies joining therein, in the same manner as the demised track. Nothing herein shall be construed as preventing either party from constructing an independent line of its own upon other streets than those named in this agreement, to the Missouri River, and establishing thereon freight and passenger depots, or either of them in their own interest, but if either of the parties hereto shall acquire land for the purpose of establishing, and shall elect to establish thereon, such freight and passenger depots, within five hundred (500) feet of the track hereby demised, it shall give the other parties hereto, or either of them, the option to join in such purchase and the establishment of such depot upon equal terms with it, and reasonable notice shall be given of such intention.

(9) It is further mutually understood and agreed between all of the parties hereto that the said demised track from the point of connection aforesaid to the terminus thereof upon the Missouri River and all side, spur and switch tracks co-terminus with and connected with said demised track, and co-terminus and connected with either of the tracks between 15th Street and the point of connection of the said two tracks shall be operated in the manner following, to wit:

Each party hereto shall alternately furnish the necessary motive power and train men for the receipt, transfer [fol. 637] and delivery of all cars upon and over said track. That is to say that said Northwestern Company shall furnish such motive power and men for the period of three (3) months from the time the connection is made with the track of the said Burlington and Rock Island Companies. The succeeding three (3) months such motive power and men shall be furnished by the said Burlington Company and the next succeeding three (3) months by the Rock Island Company and so on during the term of this agreement.

An accurate account shall be kept in such manner as the General Superintendent of the said Companies may agree upon of all cars, whether loaded or empty, handled upon said track and the cost of the operation thereof shall be divided among and borne by said Companies in proportion to the number of cars of each Company so handled upon said track. Settlement of such operating expenses shall be made monthly and balances due from either Company to the other for such operating expenses shall be promptly paid in the manner usual for the settlement of such accounts between railroad companies.

(10) It is further mutually understood and agreed that after the expiration of the said term of ten (10) years this agreeemnt and lease shall remain in full force and effect and be binding upon each of the parties hereto until terminated by notice in the following manner, viz: Any one of said parties may give notice in writing to the others not less than six (6) months before the expiration of any calendar year of its intention to withdraw from the said agreement at the end of said calendar year and upon such notice being given as aforesaid this agreement and the obligations of the parties thereunder shall cease and determine at the end of such calendar year.

(11) It is further understood and agreed that any additional side or spur tracks that may be built pursuant to the terms of this agreement, at the joint and equal expense of the parties hereto, shall at the end of the term herein named, or at the termination thereof by notice, as herein-

before provided, be and remain the joint property of the [fol. 638] parties hereto until the parties hereto shall by agreement otherwise provide, and if at any time thereafter the said Burlington and Rock Island Companies, or either of them shall extend their track beyond the point of connection aforesaid they or either of them shall be entitled to connect such track with any of said side or spur tracks and to construct any cross over tracks necessary to make such connections and connect the same with said track of the Northwestern Company, but at their own proper cost and expense. Provided, However, that such connections shall be made in such manner as not to materially impair the usefulness to the Northwestern Company of its track and of said side and spur tracks and that said parties, or either of them, making such connections shall share in equal proportions with said Northwestern Company the cost of maintaining such sidings and any part of the Northwestern track used in connection therewith, and so long as such side or spur tracks remain the joint property of the parties hereto they shall be maintained at joint expense. If after the termination of this agreement, and the term thereof the parties shall unanimously determine not to continue the joint ownership of said side and spur tracks the same shall be valued by three experts to be chosen one by each of the parties hereto, and the said Northwestern Company may, if it so elect, purchase the interest of the other two Companies therein at such appraised valuation.

(12) If, at any time, a difference of opinion between any two of said parties shall arise in respect to the rights and duties of either of the said parties under this Indenture, the question in dispute shall be referred to a Board of Arbitrators, consisting of three competent, disinterested parties, one to be chosen by each of the parties so differing, and the two so chosen to choose a third.

[fol. 639] The party desiring such arbitration shall give written notice of the same to the other party, setting forth therein definitely the points in dispute and naming he person selected by such party to act as arbitrator. If the party on whom such notice is served shall for ten days

thereafter neglect to name a person to act as such arbitrator, then the party giving such notice shall name such second arbitrator, and the two so chosen shall choose a third. If the difference shall arise between all three of the parties such board of arbitrators shall consist of five persons one to be chosen by each of said parties and the three so chosen shall choose the other two. The Board of Arbitrators so chosen shall immediately proceed to hear and determine all matters submitted to them, after giving to each of the parties to the matter in controversy not less than five days notice of the time and place of meeting, and at the time and place appointed shall proceed summarily to hear and dispose of the matter in dispute, unless in their judgment the hearings should be postponed to a later day, or days, of which adjourned meeting like notice shall be given, unless such notice is waived by both parties, in which case the hearing may proceed at an earlier date. The determination of such Board of Arbitrators, or of a majority of them, as to any matter so submitted to them shall be absolutely final and conclusive upon the parties hereto, and said parties shall abide by such decision and perform the conditions thereof as if the same were made a part of this Indenture.

In Witness Whereof the parties hereto have caused their corporate names to be hereto subscribed by their respective Presidents, their corporate seals to be hereunto affixed and attested by their respective Secretaries the day and year first above written.

Duly Executed By All Parties.

[fol. 640] Defendant Rock Island Exhibit 27-A is reproduced as follows:

[fol. 641] Defendant Rock Island Exhibit 27-A

8/13/56 M: J. D.

This Agreement, made and entered into this 21st day of November, A.D. 1910, by and between Chicago and North Western Railway Company (hereinafter called the "North

Western Company"), party of the first part, and the Chicago, Burlington and Quincy Railroad Company (hereinafter called the "Burlington Company"), and the Chicago, Rock Island and Pacific Railway Company (hereinafter called the "Rock Island Company"), parties of the second part,

Witnesseth:

That Whereas in accordance with an agreement made and entered into between the parties hereto January 1, 188?, a system of tracks owned jointly by the parties hereto has been constructed in First Avenue in the City of Council Bluffs, Iowa, together with certain spurs and additions to said tracks; and

Whereas by Paragraph Nine of said agreement it was provided that each Company should alternately furnish the necessary motive power and trainmen for the receipt, transfer and delivery of all cars upon and over said tracks; and

Whereas it is now desired that the North Western Company shall perform all switching service upon said tracks;

Now Therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, it is agreed as follows:

First: The North Western Company shall with its own switch engine do all switching of cars of the parties hereto, consigned to or from industries or persons located on any portion of said joint tracks between Sixteenth Street and Thirty-eighth Street in Council Bluffs, or any extension thereof. For the purpose of performing such switching service, cars shall be delivered to and received from the North Western Company at such points on such joint tracks as shall be agreed upon between the respective Division Superintendents of the parties hereto.

[fol. 642] Second: The Burlington and Rock Island Companies shall each pay monthly to the North Western Company such proportion of the total cost of said switching as the number of loaded cars handled for said Burling-

ton and Rock Island Companies, respectively, shall bear to the total number of loaded cars so handled for all parties hereto. Said cost shall include the rental value of said engine while engaged in said work at the rate of Eight Dollars ($8.00) per day, and the actual cost of operating, maintaining and repairing said engine and all supplies for the same.

Third: In case of the derailment of any car or engine while engaged in the switching service herein provided for, the North Western Company shall make all repairs necessitated by said detailment, and the cost thereof and all loss and damage resulting from said derailment shall be borne by the parties hereto on a pro rata basis as provided in Paragraph Second hereof for the apportionment of the cost of switching.

Fourth: All employees engaged in the switching operations herein provided for, shall whenever so engaged be deemed the joint employees of the parties hereto. Each party hereto assumes and agrees to pay all loss of and damage to its own property, and to persons and to property carried by it, or exclusively employed and controlled by it, caused by the switching operations herein provided for, unless such loss or damage be solely caused by the negligence of one or more of the other parties hereto, its or their officers, agents, servants or employees, in which case all such loss or damage shall be paid by the party or parties responsible for such negligence. If any such loss or damage shall be caused or contributed to by the fault or negligence of any of the officers, agents, servants or employees fo two or more of the parties hereto, each such party assumes and agrees to pay an equal amount of all loss or damage resulting directly oe indirectly therefrom. If the parties [fol. 643] cannot agree upon the cause of any loss or damage or the causal contribution thereto, such cause or causal contribution shall be determined by arbitration, each party interested to appoint one of its operating officers, and if the number so appointed shall be an even number, those appointed shall choose an additional disinterested railroad operating officer; and the written decision of the tribunal so constituted, signed by a majority of the mem-

bers thereof, shall determine the controversy; and such determination shall be a part of this contract, and shall be final and conclusive upon the parties. All loss, damage or injury to persons or property other than that above mentioned, caused by said switching operations, shall be treated as a part of the cost of said switching to be borne by the parties hereto as provided in Paragraph Second hereof. The term "loss and damage" shall include costs and disbursements relating thereto. Amounts paid by either party hereto upon judgments in actions brought against such party to recover any such loss or damage, shall be settled by the parties hereto in accordance with the above agreement, notwithstanding the judgment. Amounts paid by either party hereto in settlement of any claim made against such party on account of any such loss or damage, shall be settled by the parties hereto in accordance with the above agreement, provided that neither party hereto shall pay or settle any such claim without giving to the other party an opportunity to assume the settlement or defense thereof.

Fifth: The joint tracks hereinabove described shall be used by the parties hereto exclusively for the interchange of and handling of such cars only as are destined to or from industries located upon any of said joint tracks, and shall not be used for any other purpose whatsoever.

Sixth: Every sum of money which shall under this agreement become due from any party to any other party, shall be paid by the debtor party within twenty (20) days after [fol. 644] presentation to it of the proper bill or bills therefor, all of which shall be made and presented monthly in the manner usual and customary among railway companies.

Seventh: Except as herein expressly modified or amended, said agreement of January 1, 1889, shall be and remain in full force and effect between the parties.

Eighth: The benefits and obligations of this agreement shall extend to and shall bind the successors, lessees and assigns of the parties hereto.

Ninth: This agreement may be terminated at anytime by any party hereto giving to the other thirty days' notice

in writing of such termination, and upon the expiration of the time limited in any such notice, this agreement shall cease and be at an end; but no termination of this agreement shall operate to terminate said agreement of January 1, 1889.

In Witness Whereof, the parties hereto have caused this agreement to be executed and their corporate seals affixed the day and year first above written.

Duly Executed By All Parties.

[fol. 645] ELMER SMITH, recalled for further direct examination as follows:

In handling an order normally for a car for loading at an industry, other than an industry located on the River Track, which ordered a car for shipment on some other line of railroad, we would request the empty from the carrier that was to get the line-haul. We would receive the empty car through their interchange track, and place the empty at the industry ordering the car. When the car was loaded, the line-haul carrier would in turn advise us, or give us a switch order ,and we would then switch the car to their interchange track, placing the same on our interchange report and also placing it on the interchange switch report. If it was a case where the arbitrary per diem covered, it would be entered on the reciprocal switching report line provided for same under the arbitrary per diem reclaim statement and accounted for in that manner. If it wasn't under such an agreement, it would be placed on the regular per diem reclaim statement and accounted for in that manner, which is rare.

Q. The distinction between cars moving out from the Kansas Grain elevator and the usual practice with respect to [fol. 646] other industries lies in the fact that the car supply at the elevator is pooled, is that right?

A. Yes, sir.

Mr. Anderson: I move to strike that.

The Court: Sustained.

There are three side tracks serving Kansas Grain elevator with a total capacity of about thirty cars.

Mr. Howland: I think I have completed the evidence which I wish to have made a part of the record. I desire to thank the court for his patience and consideration, and at this time I offer and introduce in evidence any exhibits identified this afternoon by me which have not been offered or received. I think we will rest.

The Court: We will receive them subject to whatever objections they ought to be subjected to. Is there evidence on the part of Union Pacific?

Mr. Anderson: The Defendant Union Pacific Railroad Company at the close of the Defendant Chicago, Rock Island and Pacific Railroad Company's evidence as cross complainant, the said claimant having rested, now moves to dismiss the Chicago, Rock Island and Pacific Railroad Company's claim as against Defendant Union Pacific Railroad Company for the following reasons:

1. The cross claim does not state a claim against this defendant upon which relief can be granted.

2. For the reason that in view of the judgment in favor of the Defendant Union Pacific and against the plaintiff in the main action, under the applicable law Rock Island is not entitled to indemnity from Union Pacific.

3. The evidence is insufficient to sustain a judgment in [fol. 647] favor of the cross claimant against this defendant.

4. The cross claimant has not shown any right to relief under the facts and the law against the Union Pacific.

Mr. Johnson: To save time I would like to make a motion and [and] adopt the same grounds urged by the Union Pacific as to the Northwestern in each and every particular of their motion.

Mr. Howland: We make the following resistance to the motion of Union Pacific:

First, that under the evidence and under the law, that there is a contractual and legal obligation on the part of the Union Pacific Railroad to bear the liability for any judgment which may ultimately be recovered, and which has been ordered by this court against Rock Island, and that the Defendant Rock Island is entitled to indemnification from the Union Pacific. I desire to point out as grounds of that motion and that resistance that it is conceded that the Union Pacific received the line-haul movement of the car, R.I. 145287, known as the offending car. Received all revenues therefrom, and is, under the facts, and under the law, obligated to assume the responsibility for the condition of the car at the time that the loading of same was completed and plaintiff, W. E. Williams, received injury.

The Court: Yes. Now, the defendant Northwestern has also moved to dismiss the Rock Island's cross claim against it on the same grounds. What have you to say about that?

Mr. Howland: If the court please, I desire to resist the motion of the Defendant Chicago and Northwestern for each and all of the following reasons, to-wit:

1. That the contracts relied upon by Chicago and North- [fol. 648] western, and upon which its motion to dismiss are predicated, are contracts with Butler-Welsh-Grain Company, another co-partnership.

Mr. Howland: I understand that the Northwestern has pleaded certain contracts and we have denied that those contracts are in force. The execution of the contracts is admitted by the Rock Island, but it is our contention that because of the sale of the elevator those contracts had been nullified and I resist the motion for dismissal or directed verdict of the Defendant Chicago, and Northwestern on each and all of the following grounds:

2. That based upon the provisions of the contract, Exhibit 27A, it affirmatively appears that this loss involved

in the injury of W. E. Williams is within the provision "all loss, damage, or injury to persons or property other than that mentioned above, caused by said switching operation," and is to be treated as a part of the cost of said switching to be borne by the parties as provided in paragraph second of the contract itself, namely, "that each party shall bear such proportion of total cost of said switching as the number of loaded cars handled for the Burlington and Rock Island bears to the total number of loaded cars handled for all parties during that month."

The Court: Yes, sir.

Mr. Howland: And if not governed—further, if not governed by the provisions of the Exhibit 27A, that then under the pleadings it is governed by the contract which is referred to, and attached to and made a part of the cross claim of the Defendant Chicago Rock Island and Pacific Railroad Company.

[fol. 649] At this point, the court dictated to the Reporter his findings and conclusions of law which were thereafter transcribed, signed and filed in the Office of the Clerk on August 15, 1956, as follows:

[fol. 650] Findings, Conclusions, and Judgment upon the Cross Claims of Chicago, Rock Island and Pacific Railroad Company against Chicago and Northwestern Railroad Company and Union Pacific Railroad Company, Respectively.

(Filed in U. S. District Court on August 15, 1956)

United States District Court
Southern District Of Iowa
Western Division.

W. E. Williams, Plaintiff,

No. 1-196. vs. Civil Action.

Chicago, Rock Island and Pacific Railroad Company, a Corporation; et al., Defendants.

The issues between the plaintiff and the several defendants herein having been earlier tried to, and determined by, a jury, through the verdict of the jury and the judgment of the Court of October 19, 1955, and, the Court having earlier, on this 13th day of August, 1956, heard the parties in interest upon the motion for new trial of the defendant, Chicago, Rock Island and Pacific Railroad Company, and upon the several motions of defendants, the Chicago and North Western Railway Company and Union Pacific Railroad Company, for an order amending the verdict of the jury and amending the judgment of the Court, and the same having been earlier ruled and determined by the Court on this day, the Court thereafter, as ordered earlier—on October 19, 1955—by Judge Riley, announced that he was ready to proceed to conduct a separate trial of the issues joined between the defendant, Chicago, Rock Island and [fol. 651] Pacific Railroad Company and Chicago and North Western Railway Company under the former's cross complaint against the latter, and the issues under the cross complaint of Chicago, Rock Island and Pacific Railroad Company against Union Pacific Railroad Company under the former's cross complaint against the latter, and, upon these issues, the causes came on regularly for trial before the Court, without a jury, on this 13th day of August, 1956 (all other issues under pending cross complaints having earlier become entirely moot by reason of the verdict of the jury and judgment thereon) and the parties appeared by their counsel and the hearing upon those issues was commenced, and evidence was adduced, and the Chicago, Rock Island and Pacific Railroad Company, having introduced all its evidence, rested. Thereupon the cross claimants, the defendants, Chicago, North Western Railway Company and Union Pacific Railroad Company, respectively, moved to dismiss the cross complaint against them of the Chicago, Rock Island and Pacific Railroad Company for the several reasons assigned by them respectively. Counsel for the Chicago, Rock Island and Pacific Railroad Company has now been fully heard in resistance to these motions.

I am convinced, after having thoroughly considered these phases of the case, that the testimony, the facts and circumstances in evidence, and the permissible inference that may be drawn therefrom, does not establish any liability on the part of either the Chicago and North Western Railway Company or Union Pacific Railroad Company to indemnify Chicago, Rock Island and Pacific Railroad Company against the consequences of the William's judgment, obtained in the trial of the earlier and separate issues of liability to the plaintiff Williams, and that there is just no evidence whatever of any obligation on the part of either Chicago and Northwestern Railway Company or of the Union Pacific Railway Company, in the circumstances here, to indemnify Chicago, Rock Island and Pacific Railroad Company in its circumstances here, and, on this general finding of fact (about as specific as it can be made—in the [fol. 652] light of the complete lack of evidence), I make the conclusion of law that Chicago, Rock Island and Pacific Railroad Company is not entitled to recover indemnity or other relief herein against either the Chicago and North Western Railway Company or Union Pacific Railroad Company on Chicago, Rock Island and Pacific Railroad Company's cross claims [against] them respectively herein; and that, therefore, the motion of the cross defendants, Chicago and North Western Railroad Company and Union Pacific Railroad Company, to dismiss the cross claims against them of Chicago, Rock Island and Pacific Railroad Company herein, are good, and they should be, and they are hereby sustained; and, the cross complaints of the Chicago, Rock Island and Pacific Railroad Company against the Chicago and North Western Railway Company and the Union Pacific Railroad Company should be, and they are hereby dismissed.

An exception is allowed to the Chicago, Rock Island and Pacific Railroad Company.

Perhaps I should say, in conclusion, and I do say, that the Clerk is directed to enter judgment of dismissal of Chicago, Rock Island and Pacific Railroad Company's cross claims against Chicago and North Western Railway Company and Union Pacific Railroad Company, respectively.

An exception is allowed to the Chicago, Rock Island and Pacific Railroad Company to these decisions [nad] orders of the Court.

CHARLES E. WHITTAKER,
United States Circuit Judge.
(By Assignment)

In accordance with above

It is Ordered and Adjudged that the Cross Claims of Chicago, Rock Island & Pacific Railroad Company against the Chicago & North Western Railway Company and the Union Pacific Railroad Company be and they are dismissed.

Order Journal No. 2.
Pages 371, 372, 373.

Honorable Charles W. Whittaker,
United States Circuit Judge,
Serving by Assignment.

August 15, 1956.

Present and Presiding.

[fol. 655] (Order overruling Motion of Defendant, Chicago, Rock Island and Pacific Railroad Company for New Trial; Sustaining Motion of Defendant Chicago and Northwestern Railway Company to amend Verdict and to alter or amend Judgment; Sustaining Motion of Defendant Union Pacific Railroad Company to amend Verdict and to alter or amend Judgment; Trial on Cross Claims of Defendant Chicago, Rock Island and Pacific Railroad Company; Cross Claims dismissed.)

(Filed in U. S. District Court on August 13, 1956.)

United States District Court
Southern District Of Iowa
Western Division

W. E. Williams, Plaintiff,
No. 1-196. vs. Civil.
Chicago, Rock Island & Pacific Railroad Company, a Corporation, Chicago & Northwestern Railway Company, a Corporation, and Union Pacific Railroad Company, a Corporation, Defendants.

On this 13th day of August, 1956, this case came on for hearing on Motion of Chicago and Northwestern Railway Company to Amend Verdict and to Alter or Amend the Judgment; Motion of Union Pacific Company to Amend Verdict and to Alter or Amend the Judgment; Motion of Chicago, Rock Island & Pacific Railroad Company for New Trial, Request for Hearings on Cross Claims by Chicago, Rock Island & Pacific Railroad Company; Resistance of Chicago, Rock Island & Pacific Railroad Company to Motions of Chicago & North Western Railway Company and Union Pacific Railroad Company to Amend Verdict and to Alter or Amend Judgment, and the issues having been duly presented to the Court by Harold T. Beckman and John L. Peterson, Attorneys for Plaintiff, and A. B. Howland and John Fletcher, attorneys for Chicago, Rock Island & Pacific Railroad Company, Ray Johnson, Attorney for Chicago & Northwestern Railway Company and J. H. Anderson and Addison C. Kistle, Attorneys for Union Pacific Railroad Company, and the Court being fully advised in the premises

[fol. 656] It is Ordered that the motion of the Chicago, Rock Island & Pacific Railroad Company be and the same is overruled; Motion of Chicago & North Western Railway Company to Amend Verdict and to Alter or Amend Judgment sustained; Motion of Union Pacific Railroad Company to Amend Verdict and to Alter or Amend Judgment sustained; Trial on Cross Claims of Chicago, Rock Island & Pacific Railroad Company [agains] the Chicago & North Western Railway Company and Union Pacific Railroad Company—evidence of parties, arguments of counsel, cross claims dismissed—written order to be prepared.

Order Journal No. 2.
Pages 354, 355.

Honorable Charles E. Whittaker
United States Circuit Judge
Serving by Assignment,

Present and Presiding

August 13, 1956.

Form 109-5 (Rev.-5-48)
10M Sets—5-48

Draft R.I. & 20 mgd 10/18/55

CONTRACT OF SALE

KANSAS GRAIN CO., OMAHA
(Trade Name of Flour Mills of America, Inc.)
[redacted]

Contract No. 11v93 4293 20-170

Date February 10, 1953

Sold To Houlton Grain Co., Denver, Colo.

Weights Omaha

Grades Omaha

Broker Hubbard Grain 7348 1/4¢ 2/10

We Confirm Sale To You Today:

QUANTITY	GRADE AND GRAIN	PRICE PER BUS.	BASIS
20,000 Bushels (10 cars)	#2 Yellow Corn	1.52	Denver

Official Weights and Grades, when furnished by Seller, to be final. Demand draft with documents attached, Payable on Presentation. Time of shipment subject to delays caused by conditions beyond Shippers control including strikes. Subject to Reciprocal Margins. Any advance in applicable Freight Rate effective before fulfillment of this Contract to be for Buyers Account.

Time of Shipment: ~~Now~~ One car each day — 10 cars —

Destination/Routing: Denver via UP

Remarks:

20,000
2000 2/11
18,000
4,000 2/13
14,000
8,000 2.16
6,000 Final

6000
2000 2.19
4000
2000 2.24
2000
2000 2.25
—0—

2 cars 2/14 Polak Thomas Grain Co., Inc.

KANSAS GRAIN CO., OMAHA

DATE IN L & S
2/10

INIT.	CAR NO.	GRADE	SHIPPERS WEIGHT	UNLOAD WEIGHT	BUSHELS	DATE OUT L & S	ORIGIN	INV. NO.
[redacted]								

20,000
2000 2/11
18,000
4,000 2/13
14,000
8,000 2.16
6,000 Final

2000 2.19
2000
2000 2.24
2000
2000 2.25
—0—

[fol. 657] Notice Of Appeal Of Defendant Chicago, Rock Island And Pacific Railroad Company.

(Filed in U. S. District Court August 24, 1956.)

[fol. 658] In The United States District Court
Southern District Of Iowa
Western Division

W. E. Williams, Plaintiff,
No. 1-196. vs. Civil.
Chicago, Rock Island And Pacific Railroad Company, Chicago And Northwestern Railway Company, and Union Pacific Railroad Company, Defendants.

To: E. E. Poston, Clerk, U. S. District Court for the Southern District of Iowa,

and

To: W. E. Williams, Chicago and Northwestern Railway Company and Union Pacific Railroad Company.

Notice is hereby given by Chicago, Rock Island and Pacific Railroad Company, a defendant in the above cause, to the above named parties and to all other persons interested in this cause, that it has appealed and does by this Notice appeal from the judgment for the plaintiff filed and entered in this cause on or about October 19, 1956, from the judgment of the Court denying relief on its cross claims against the co-defendants in this cause, which judgment was entered on or about August 13, 1956, from the judgment of the Court overruling its Motion for a New Trial, which judgment was entered on or about August 13, 1956, and from each and every order, finding or entry adverse to this defendant, to the United States Court of Appeals for the Eighth Circuit.

[fol. 659] And you and each of you are further notified that said cause will come on for hearing and submission in the United States Court of Appeals for the Eighth Circuit

in accordance with the statutes and rules governing submission of causes in said court.

CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY,
By Oscar E. Johnson,

ROBERT M. STUART,
Park Building,
Council Bluffs, Iowa,

A. B. HOWLAND,

B. A. WEBSTER, JR.,
500 Bankers Trust Building,
Des Moines, Iowa CHerry 3-6251

Attorneys for Plaintiff.

[fol. 660] (Recital of filing of Cost Bond on Appeal by Defendant, Chicago, Rock Island and Pacific Railroad Company.)

At the time of filing of said Notice of Appeal, Chicago, Rock Island and Pacific Railroad Company paid to the Clerk of the U. S. District Court the necessary fees, and filed with said Clerk a good and sufficient cost bond on appeal in the penal sum of $250. with corporate surety thereon which was approved by Clerk of said Court.

(Recital of filing of Supersedeas Bond by Defendant, Chicago, Rock Island and Pacific Railroad Company.)

Chicago, Rock Island and Pacific Railroad Company also filed a Superseadeas Bond in the penal sum of $50,000 with corporate surety thereon, which bond was approved by Judge Charles E. Whittaker, and the surety thereon approved by the Clerk of the U. S. District Court.

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[fol. 670] (Relevant Docket Entries in United States District Court.)

United States District Court
Southern District Of Iowa
Western Division

W. E. Williams, Plaintiff,
No. 1-196. vs. Civil.
Chicago, Rock Island And Pacific Railroad Company, a Corporation; Chicago And North Western Railway Company, a corporation; and Union Pacific Railroad Company, a corporation, Defendants.

1955.

Feb. 4, Filed Complaint.

" 28, Filed Separate Answer of the Defendant, Chicago and North Western Railway Company. Filed Proof of Service.

" 28, Filed Answer of Defendant, Chicago, Rock Island and Pacific Railroad Company.

" 28, Filed Separate Answer of Defendant, Union Pacific Railroad Company.

Mch. 9, Filed Demand for Jury Trial.

" 18, Filed Order on Pretrial Conference. Ent. OJ2-166-170.

Notice to Attys. 3/21/55.

Apr. 11, Entered Order—Case passed for term. Riley, J. OJ2-184.

Aug. 18, Filed Cross-Claim of the defendant, Chicago and North Western Railway Company, against the defendant, Chicago, Rock Island and Pacific Railroad Company. Filed Proof of Service of Cross-Claim.

" 30, Filed copy of Notice of Pretrial Conference.

Sept. 8, Filed Answer of Defendant, Chicago, Rock Island and Pacific Railroad Company to Cross-

Claim of defendant, Chicago and North Western Railway Company and Cross-Claim of Chicago, Rock Island and Pacific Railroad Company against Chicago and Northwestern Railway Company.

" 8, Filed Cross-Claim of Defendant, Chicago, Rock Island and Pacific Railroad Company against defendant, Union Pacific Railroad Company.

" 9, Filed Order on Pretrial Conference. Riley, J. Ent. OJ2 pages 243 to 248, incl. Notice to Counsel 9/9/55.

" 9, Filed sealed Deposition of W. E. Williams.

[fol. 671]

Sept. 13, Filed Motion for Judgment on the Pleadings or Summary Judgment.

" 13, Filed Amendment to Answer of the Defendant, Chicago and North Western Railway Company. Filed Proof of Service.

" 13, Filed Separate Amended Answer and Cross-Claims of Defendant, Union Pacific Railroad Company.

" 14, Filed Answer of the Defendant, Chicago and North Western Railway Company, to the Cross-Claim of the Defendant, Chicago, Rock Island and Pacific Railroad Company, against the Chicago and North Western Railway Company.

" 14, Filed Separate Answer of the Defendant, Chicago and North Western Railway Company, to the Cross-Claim of the Defendant, Union Pacific Railroad Company.

" 14, Filed Cross-Claim of the Defendant, Chicago and North Western Railway Company, against the Defendant, Union Pacific Railroad Company. Filed Proof of Service.

" 14, Filed Answer of Defendant, Union Pacific Railroad Company to Cross-Claim of Chicago, Rock

Island and Pacific Railroad Company against the said Defendant.

" 19, Filed Answer of Defendant, Union Pacific Railroad Company to Cross-Claims of Chicago and North Western Railway Company against the said defendant.

" 19, Filed Deposition of W. E. Williams taken on behalf of Defendant. Filed pursuant to Rule 17.

" 20, Filed Request for Admission of Facts.

" 20, Filed Answer of Defendant, Chicago, Rock Island and Pacific Railroad Company to Cross-Claim of Union Pacific Railroad Company.

" 20, Filed Request for Admission of Facts. (Plaintiff's)

" 20, Filed Interrogatories directed to Chicago, Rock Island and Pacific Railroad Company.

" 20, Filed Interrogatories directed to the Chicago and North Western Railway Company.

" 20, Filed Interrogatories directed to the Union Pacific Railroad Company.

" 27, Filed Reply of Chicago, Rock Island and Pacific Railroad Company to Answer of Defendant, Union Pacific Railroad Company to Cross-Claim.

" 28, Filed Response of Chicago and North Western Railway Company to Request for Admission of Facts by Plaintiff.

" 28, Filed Response of Chicago and North Western Railway Company to Request for Admission of Facts by Defendant, Chicago, Rock Island and Pacific Railway Company. Filed Proof of Service.

[fol. 672]

Sept. 28, Filed Motion to Quash Request for Admission of Facts and Interrogatories.

" 28, Filed Admission of Facts. Filed Proof of Service.

" 29, Filed Reply to Request for Admission of Facts. (Plaintiff's)

" 29, Filed Plaintiff's Request for Instructions.

" 30, Filed Motion to Strike Reply of Chicago, Rock Island and Pacific Railroad Company to Answer of Defendant, Union Pacific Railroad Company, to Cross-Claim.

" 30, Filed Response to Defendant, Chicago, Rock Island and Pacific Railroad Company's Request for Admissions by Defendant, Union Pacific Railroad Company.

" 30, Filed Answers t o Defendant, Union Pacific Railroad Company, to Interrogatories of the Plaintiff.

" 30, Filed Reply to Plaintiff's Request for Admissions by Defendant, Union Pacific Railroad Company.

" 30, Filed Amendment to Reply of Plaintiff to Request for Admission of Facts.

Oct. 3, Filed Amendment to Responses to Request for Admission of Facts by Defendant, Chicago, Rock Island and Pacific Railroad Company.

" 3, Filed Motion of Defendant, Chicago, Rock Island and Pacific Railroad Company to Strike Plaintiff's Reply to Request for Admission of Facts with Respect to Certain Requests, or in the Alternative for an Order Requiring Plaintiff to either Admit or Deny the Truth of the Requests.

" 3, Filed Answer to Interrogatories.

" 3, Filed Motion for Order Directing the filing of Defendants' Reply to the Answer of Union Pacific Railroad Company to Cross-Claim of the

DATE IN L & S		
2/10		

INIT.	CAR NO.	GRADE	SHIPPERS WEIGHT	UNLOAD WEIGHT	BUSHELS		DATE OUT L & S	ORIGIN	INV. NO.
RQ	145287	2 yel 56 5 15 4 3 0	2/11	112,000	2000	ov	2/11	KS Elw	4r
MStL	54744	2 yel 56 5 15 5 3 8	2/12	112000	2000	=	2/13	✓	✓
SNW	47944	✓ 56 5 15 5 3 9	2/13	112000	2000	=	✓	✓	✓
SNW	54677	3 yel 57 0 15 4 3 6 3 7		112000	2000	=	2/14	✓	✓
SLSF	142075	✓ 56 5 15 4 3 8 3 5	2/14	112000	2000	=	✓	✓	✓
OLW	47068	2 yel 57 0 15 5 3 7 3 9		112000	2000	=	✓	✓	✓
RI	146491	✓ 57 0 15 4 4 3 8	2/16	112000	2000	=	✓	✓	✓
SBW	27328	1 ed 2 yel 56 5 15 5 4 4 4 9	2/17	112000	2000	=	2/19	✓	✓
UP	187579	2 yel	2/21	112000	2000	=	2/24	✓	✓
NYC	120461	2 yel 57 0 15 0 3 7 3 0	2/25	112000	2000	=	2/25	✓	✓

Filled.

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Chicago, Rock Island and Pacific Railroad Company.

" 3, Filed Answer of Defendant, Chicago and North Western Railway Company to Interrogatories. Filed Proof of Service of Answer to Interrogatories.

" 5, Filed Order. Riley, J. Ent. OJ2-255, 256. Motion for Summary Judgment overruled; Motion to Strike Reply of Chicago, Rock Island and Pacific Railroad Company to Answer to Cross-Claim sustained; Motions to Quash Request for Admissions of Facts and Interrogatories, to Strike Plaintiff's Reply to Request and to File a Reply to Answer to Cross-Claim overruled.

" 10, Notice to Counsel 10/5/55.

" 10, Filed Challenge Sheet.

" 10, Ent. Trial Procedure—Jury impaneled; opening statements of counsel; evidence for plaintiff not concluded. Riley, J. OJ2-258, 259.

[fol. 673]

Oct. 11, Ent. Trial Procedure. Riley, J. OJ2-263. Evidence for Plaintiff continued.

" 12, Ent. Trial Procedure. Riley, J. OJ2-268. Evidence for Plaintiff not concluded.

" 13, Ent. Trial Procedure. Riley, J. OJ2-270. Plaintiff's evidence concluded; defendants' motions for directed verdict—ruling reserved; defendants' evidence not concluded.

" 17, Ent. Trial Procedure. Riley, J. OJ2-276. Evidence for defendants not concluded.

" 18, Ent. Trial Procedure. Riley, J. OJ2-277. Evidence for defendants concluded; evidence for plaintiff concluded; Motions of defendants for directed verdict overruled, exceptions allowed; arguments of counsel not concluded.

" 19, Filed Requested Instructions asked for on behalf of Defendant, Chicago, Rock Island and Pacific Railroad Company.

" 19, Filed Plaintiff's requested Instructions.

" 19, Filed Chicago and North Western Railway Company's Requested Instructions.

" 19, Filed Court's Instructions to Jury.

" 19, Filed Verdict.

" 19, Ent. Trial Procedure, Riley, J. OJ2-278, 279. Trial concluded; jury retire and return into open Court with verdict for the Plaintiff and against the Defendant, Chicago, Rock Island and Pacific Railroad Company, in the amount of $42,890.27; and order giving Chicago, Rock Island and Pacific Railroad Company thirty days in which to file a motion for New Trial.

" 19, Entered Judgment for the Plaintiff, W. E. Williams, and against the Defendant, Chicago, Rock Island and Pacific Railroad Company, in the amount of $42,890.27, with interest at 5% and costs taxed at $105.65. Riley, J. OJ2-278, 279.

Notice to Counsel 10/21/55.

" 19, Filed Plaintiff's Exhibits A, B, B1, C, C1, D, E, E1, F1, G1, H1, I1, J1, L1, M, N, O, O1, O2, O3, O4, O5, O6, O7, O8, O9, O10, O11, O12, O13, O14, O15, O16, O17, O18, O19, O20, O21, O22, O23.

" 19, Filed Defendant, Chicago, Rock Island and Pacific Railroad Company's Exhibits 4, 5, 7, 10, 12, 13, 17.

" 19, Filed Defendant, Union Pacific Railroad Company's Exhibit 1A.

" 26, Filed Court's copy of transcript of motions. (in Des Moines Office).

" 28, Filed Motion of Chicago, Rock Island and Pacific Railroad Company for New Trial.

[fol. 674]

Oct. 28, Filed Request for Hearing on Cross-Claims. Filed Certificate of Mailing of copies of Motion for New Trial and of Request for Hearing on Cross-Claims.

" 28, Filed Motion of Union Pacific Railroad Company to Amend Verdict and to Alter or Amend Judgment.

" 28, Filed Order allowing Plaintiff additional time to Proceed. Riley, J. OJ2-283. Notice to Counsel 10/28/55.

" 28, Filed Motion of Chicago and North Western Railway Company to Amend Verdict and to Alter and Amend the Judgment, with Certificate of Service.

" 31, Filed Resistance of Chicago, Rock Island and Pacific Railroad Company to Motions of Chicago and North Western Railway Company and Union Pacific Railroad Company to Amend Verdict and Alter or Amend the Judgment, with Certificate of Service.

" 31, Filed Bill of Costs and taxation in the amount of $105.65.

1956.

Aug. 13, Entered, Motion of Chicago, Rock Island and Pacific Railroad Company for New Trial overruled; Motion of Chicago and North Western Railway Company to Amend Verdict and to Alter or Amend Judgment sustained; Motion of Union Pacific Railroad Company to Amend Verdict and to Alter or Amend Judgment sustained; Trial on Cross-Claims of Chicago, Rock Island and Pacific Railroad Company; evidence

of parties completed; Cross-Claims dismissed; to be written Order. Whittaker, J. OJ2-354, 355.

" 13, Filed Defendant, Chicago, Rock Island and Pacific Railroad Company's Exhibits Nos. 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 27A.

" 13, Filed Memorandum re—Motion of Union Pacific Railroad Company to Amend Verdict and to Alter or Amend Judgment.

" 13, Filed Third Supplemental Brief of Union Pacific Railroad Company.

" 13, Filed Memorandum Brief of Authorities on Motion for New Trial and Hearing upon Cross-Claims.

" 14, Filed Order for Withdrawal of certain Exhibits. Whittaker, J. OJ2-356.

" 15, Filed Memorandum of Chicago, Rock Island and Pacific Railroad Company's Motion for New Trial and upon Motions of Chicago and North Western Railway Company and Union Pacific Railroad Company to Amend Verdicts and Judgment. Whittaker, J. OJ2-366, 371, incl. Notice to Attys. 8/15/56.

" 15, Entered. Motion of Chicago, Rock Island and Pacific Railroad Company for New Trial is overruled and denied; the separate motion of the defendant, Chicago and North Western Railway Company for an order amending the verdict of the jury and an order altering or amending the judgment is sustained; the separate motion of the Union Pacific Railroad Company for an order amending the verdict of the jury and altering or amending the judgment is sustained. Entered. Judgment against

[fol. 675] Continued.

Aug. 15, the plaintiff, W. E. Williams, and in favor of the defendants, Chicago and North Western Railway Company and the Union Pacific Railroad Company upon the issues heretofore tried and submitted to and determined by, the jury, namely, the issues heretofore existing between the plaintiff on the one hand and the three defendants on the other. Whittaker, J. OJ2-366-371, incl. Notice to Attys. 8/15/56.

" 15, Filed Findings, Conclusions and Judgment upon the Cross-Claims of Chicago, Rock Island and Pacific Railroad Company against Chicago and North Western Railway Company and Union Pacific Railroad Company, respectively. Whittaker, J. OJ2-371-373, incl. Notice to Attys. 8/15/16.

" 15, Entered—trial to Court, motions of the cross defendants, Chicago and North Western Railway Company and Union Pacific Railroad Company to dismiss the Cross-Complaints against them of Chicago, Rock Island and Pacific Railroad Company sustained.

Entered—Judgment of Dismissal of Cross-Claims of Chicago, Rock Island and Pacific Railroad Company against the Chicago and North Western Railway Company and the Union Pacific Railroad Company, respectively. OJ2-371-373, incl. Whittaker, J. Notice to Attys. 8/15/-56.

" 24, Filed Notice of Appeal. Copies of Notice of Appeal mailed to Harold T. Beckman and John L. Peterson, 301-308 Park Building, Council Bluffs, Iowa, Attorneys for Plaintiff; Frank W. Davis and Ray Johnson, 1115 Bankers Trust Building, Des Moines, Iowa, Attorneys for Chicago and North Western Railway Company; and J. H. Anderson, 1416 Dodge Street, Omaha 2, Nebraska, Attorney for Union Pacific Rail-

road Company. Done at Des Moines, Iowa. August 24, 1956. E. E. Poston, Clerk, U. S. District Court. By /s/ Gertrude Darrell, Deputy Clerk.

" 24, Filed Bond on Appeal in the amount of $250.00 for costs. Federal Insurance Company, Surety.

" 24, Filed Application of Defendant, Chicago, Rock Island and Pacific Railroad Company, for Order fixing amount of Supersedeas Bond.

Sept. 5, Filed Order Fixing Amount of Supersedeas Bond. Whittaker, J. OJ2-377. Notice to Attys. 9/5/56.

Sept. 24, Filed Supersedeas Bond on Appeal in the amount of $50,000.00. Federal Insurance Company, Surety.

Sept. 27, Filed Defendant, Chicago, Rock Island and Pacific Railroad Company's Designation of Contents of Record on Appeal.

Sept. 27, Filed Stipulation for Additional Time for Appellant to file and Docket its Printed Record on Appeal.

SUPREME COURT, U.S.

AUG 14 1957

JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 367

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY and CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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ALDEN B. HOWLAND,
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IN THE

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CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
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W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY and CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that this Court review a judgment of the United States Court of Appeals for the Eighth Circuit, which affirmed a judgment of the United States District Court for the Southern District of Iowa in favor of W. E. Williams, against petitioner alone, in a personal injury action instituted by Williams against three railroads, hereafter referred to as "Rock Island", "Union Pacific" and "Northwestern."

The opinion of the Court below has not yet been reported, but will appear in .... F. (2d) .... It is printed in Appendix A hereto.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The judgment sought to be reviewed was entered in the United States Court of Appeals for the Eighth Circuit on June 6, 1957, pursuant to its opinion filed on that date. (See Appendix B.)

Timely petition for rehearing by petitioner was denied July 5, 1957.

Jurisdiction to review the judgment below by writ of certiorari is conferred by the Act of June 25, 1948, 62 Stat. 923. U. S. C. A., Title 28, Section 1254.

Review by this Court of the decision of the Court of Appeals for the Eighth Circuit is required because:

(a) The Court of Appeals for the Eighth Circuit has erroneously decided an important question of Federal Law arising under the Federal Rules of Civil Procedure, and particularly Rule 42 thereof, which has never been previously decided by this Court, but which should be here determined.

(b) The Court of Appeals for the Eighth Circuit has decided an important question of Iowa law in a way directly in conflict with the pronouncements of the Iowa Supreme Court on the same subject.

(c) The Court of Appeals for the Eighth Circuit has rendered a decision which directly conflicts with the decisions of the Courts of Appeals for the Third, Fourth, and Sixth Circuits, and in conflict with previous decisions of the Eighth Circuit Court of Appeals itself, on the same subject.

(d) The Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings in the application of

the Federal Rules of Civil Procedure, and in the application of established rules of law to specific facts, and has sanctioned such departures by the District Court for the Southern District of Iowa, as to call for this Court's power of supervision.

QUESTIONS PRESENTED FOR REVIEW.

Three major questions, with certain subsidiary questions are presented by this record, which, we believe, require that this Court exercise its discretion to review the judgments below. The first question is procedural in character, and is of importance in the administration of the Federal Rules of Civil Procedure, and Rule 42 thereof. This question may be stated as follows:

> "Does the discretion to order separate trials of particular issues vested in a District Judge, by Rule 42, Federal Rules Civil Procedure, authorize such an order, in a jury trial, over the objections of a defendant, after the trial has commenced, opening statements of counsel have been made, and evidence of plaintiff has been completed, thereby changing the issues on trial and restricting the scope of evidence which may be offered by defendants, when no application for such order is made by any party, and no intimation was given at the opening of the trial that such order might be made?"

Plaintiff's complaint charged three defendants with joint and several negligence in supplying a defective box car to his employer to be loaded with grain. Each defendant denied negligence on its part, and filed cross-claims against its co-defendants seeking to have the ultimate liability for plaintiff's injury imposed on them. No application for separate trial of the cross-claims was made by any party, and there was no suggestion by the court that separate trials might be ordered. The case went to trial

before a jury. Plaintiff's evidence required three days of trial time. When petitioner's counsel started to introduce evidence on its behalf the trial court, in ruling upon objections to evidence, announced that separate trial to the court would be held at a later time upon the cross-claims, "if necessary", and that evidence of defendants would be restricted to the issues presented by the complaint and answer. Petitioners objections to this procedure were overruled.

The second question may be stated as follows:

> "When it appears that empty freight cars are supplied to a large industrial shipper for loading for outbound shipment by numerous railroad companies, and it is the custom and practice of the shipper, acquiesced in by the railroad companies, to substantially pool the the cars so supplied, and load and bill them out on any line of railroad selected by the shipper, and an employee of the industry sustains injury after loading of a car, supplied by one railroad, has been completed for outbound movement on another railroad selected by the shipper, over which the car is immediately billed, does primary liability for defects in the car rest upon the railroad in connection with whose business the car had been loaded, or upon the railroad which supplied the car to the shipper?"

The third question is:

> "Under the circumstances stated above is the railroad company which accepts billing on the shipment, which transports the car to destination, and collects the revenue for such transportation, exempt from liability for defects in the car which might have been discovered by reasonable care?"

Subsidiary questions relate to the admissibility of evidence offered to establish that the railroad supplying the

car performed only a switching service for the line haul railroad, and the propriety of requested instructions which told the jury that, by accepting billing on the car, the line haul railroad assumed responsibility for the condition of the car after loading by the shipper commenced.

No statute of Iowa, or of the United States, is directly involved in this case. It does involve the construction and application of Rule 42 (b), Federal Rules of Civil Procedure.

Rule 42 is as follows:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
>
> (b) Separate Trials. The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims or issues.

STATEMENT OF THE CASE.

Jurisdiction of the District Court in this personal injury action was predicated upon diversity of citizenship; Williams, a resident and citizen of Council Bluffs, Iowa, was plaintiff, and defendants were three railroad corporations, all citizens of states other than Iowa (R. 1-2).

Williams was employed in loading and unloading cars of grain at the terminal elevator of Flour Mills of America in Council Bluffs, operated under the trade name of "Kan-

sas Grain Company." He was injured about 4:20 p. m. on February 10, 1953, when the door of the box car, which he had loaded with shelled corn, fell upon him while he was endeavoring to close the car door and place a seal thereon. The box car was owned by petitioner, Rock Island, which had sent it to the elevator upon order of the grain company for cars for grain loading. At the time Williams was injured, loading of the car for outbound movement to Denver, Colo., on the line of respondent, Union Pacific, had been completed, but the bill of lading was not signed by Union Pacific until 10:45 a. m. on February 11, 1953, a few business hours after Williams' injury (R. 229).

Cars were loaded at the elevator upon direction from the Omaha office of the grain company (R. 329). Cars were never billed until after the contents of the car had been sampled and the samples graded by the Omaha Grain Exchange (R. 332).

The elevator is adjacent to an industry lead track, called the "River Track," owned by respondent "North Western," over which petitioner, "Rock Island," held trackage rights by contract, thus making the elevator an industry on petitioner's line. North Western performed all necessary switching service for delivering or removing cars at the industry. Union Pacific neither owned nor held trackage rights on any track serving the elevator. The elevator was within the Omaha-Council Bluffs switching district, so that cars moving outbound from the elevator might be billed via Union Pacific, which would, under applicable tariffs, pay, or "absorb" the switching charge of Rock Island for moving the car from the elevator to Union Pacific tracks, out of Union Pacific revenues for movement of the car to destination.

Kansas Grain did business with all railroads serving the Omaha-Council Bluffs terminal area, some ten in number,

and, as occasion required, placed orders for empty box cars with all railroads. It was a frequent practice of the elevator to load cars, supplied on order by one railroad, for outbound movement over some other railroad line, and this practice was known to and acquiesced in by the parties (R. 73, 330, 463).

The complaint charged each defendant with identical specifications of negligence in supplying to Kansas Grain a defective box car, and in failing to adequately inspect the same (R. 3-6). Each defendant denied negligence on its part, and by cross-claims against its codefendants, alleged that its liability to Williams, if any, was secondary in character, while that of its codefendants was primary. Petitioner alleged in the event of recovery by Williams against it, it was entitled to judgment over against Union Pacific (R. 47-48). Williams alone demanded a jury trial of all issues "triable of right by a jury" (R. 18). Two pretrial conferences were held (R. 18 and R. 45); at neither was any suggestion made that separate trials of particular issues would be ordered by the court. No application was made by any party at any time for such order.

Trial commenced before the court and a jury on October 10, 1955 (R. 152). Opening statements were made by counsel for all parties, each defendant being represented by its own counsel. In the opening statement for petitioner, its counsel referred at considerable length to the relationship existing between the three defendant railroads, to the fact that petitioner had received no payment for supplying the car, that the car was loaded for shipment to Denver, Colo, via Union Pacific, and that "factually and legally," while being loaded, the car was in possession of Union Pacific (R. 157-159). No suggestion was made during the opening statements that an order for separate trials of particular issues might be later made.

Upon the trial, Williams' counsel introduced admissions made by the parties which disclosed that Kansas Grain Company, on January 28th and 29th, 1953, placed orders with Rock Island for 35 box cars for grain loading (R. 228); on February 7, 1953, box car R. I. 145287 was inspected by an employee of Rock Island, who placed a card thereon reading "O. K.—Grain"; no further inspection of the car was made by Rock Island prior to Williams' injury (R. 228). A Rock Island switch crew delivered the car to North Western for spotting at the elevator, and, between the hours of 6:30 p. m. and 11:15 p. m. on February 9, 1953, the car was set by North Western in the usual position for empty cars, west of the loading shed at the elevator (R. 228-229).

During the afternoon of February 10, 1953, the car was loaded with grain by Williams and his fellow employees. After loading was completed, the car was moved by elevator employees to a position east of the loading shed, and a sample of grain was taken from the car (R. 229). Williams was injured while attempting to close the door on car R. I. 145287 when the door fell outward from the top of the car (R. 229). The sample of grain was sent to the Omaha Grain Exchange between the hours of 4:00 and 6:00 p. m. that day. On the morning of February 11, 1953, Omaha Grain Exchange notified the Omaha office of Kansas Grain that the car had graded No. 2 yellow corn (R. 229). Employees of the Omaha office of Kansas Grain then prepared a shipper's order bill of lading for shipment of the car to Denver, in which Kansas Grain Company was designated as consignor and consignee, "notify Houlton Grain Company, Denver, Colo." This bill of lading was presented to the general agent of Union Pacific at 10:45 a. m. on February 11, 1953, and signed by an authorized representative (R. 230). The bill of lading is reproduced at R. 310. Union Pacific was the only carrier named in the bill.

Petitioner moved for a directed verdict in its favor at the close of plaintiff's evidence on the ground that it was not shown to have been under any duty to plaintiff with respect to the condition of the box car; that Union Pacific was the only defendant occupying a carrier relationship to Kansas Grain and to plaintiff, and that petitioner was in no manner negligent with respect to said car (R. 274-476). Union Pacific and North Western made similar motions for a directed verdict at the close of plaintiff's evidence (R. 277-280). These motions were overruled by the trial court (R. 281).

When petitioner started to introduce its evidence, the trial court, for the first time, indicated that the issues to be tried would be limited. The court said:

> "Now, whatever the relationship may have been between you defendants I am not going to allow the incidence of your internecine war to deprive the plaintiff of his rights before this jury" (R. 283).

After further extensive colloquy between counsel and the court, shown at R. 284-292, 295-301, the trial was recessed from October 13 to October 17 to permit the presiding judge to meet a commitment at Davenport, Iowa. At the reconvening of court on October 17 counsel for petitioner objected to separate trials of particular issues on the following grounds:

> "Mr. Howland: We object to any separation of the issues for trial, or separate trials of any particular issues as between the plaintiff and as between the defendants themselves, and for grounds state: First, that we entered upon the trial of this case without any previous order or suggestion by the court, or anyone else, that there would be any separate trials of the issues, and having taken all of the evidence of the plaintiff in chief, it takes counsel for the defendant Rock Island entirely by surprise that the issues are to be limited.

"Second, that under the rules, all issues tendered by the pleadings in any case for trial are to be tried at one time, unless there has been a prior order of the court providing for separate trials.

"Third, that issues of fact are tendered by the cross claims and the answers thereto which may or may not ultimately involve questions of fact to be determined by the triers of the facts, and the parties should not be deprived of a jury trial of the issues since a jury trial has been demanded by the plaintiff.

"Fourth, it is factually and legally impossible to separate the issues between the plaintiff and the defendants and any of them without a consideration of the relationship of the defendants, one to the other.

"For all of these reasons, we request that the court permit the trial of all issues which are tendered by the pleadings at one time" (R. 298).

These objections were overruled by the Court (R. 300-301).

The trial court then sustained objections to all evidence offered by petitioner to show the relationship existing between the defendants. Specifically, the following evidence was excluded by the court:

(a) That the elevator was within the Omaha-Council Bluffs Reciprocal Switching District. [Rock Island request for Admission No. 6 (R. 94) excluded (R. 284) and proffered evidence of John A. Christiansen (R. 313-315).]

(b) The inclusion of a particular industry within the limits of a reciprocal switching district in effect extends the rails of all railroads serving the switching district to include such industry. [See proffered evidence of John A. Christiansen (R. 313-315) and ruling excluding same (R. 315).]

(c) The tariffs of Rock Island provide a switching charge of $4.86 per car for movement from Kansas Grain Elevator to interchange point with Union Pacific and Union Pacific tariffs which provided that the Rock Island charge would be "absorbed" or paid by Union Pacific and not by the shipper. [See proffered evidence of John A. Christiansen (R. 308-310, 313-315) excluded by the court (R. 315).]

(d) Union Pacific, by the per diem reclaim code, contracted to pay the owner of each car switched by Rock Island from the elevator to Union Pacific, $2.00 per day for 3.18 days, while the car was being sent to the elevator, loaded, and delivered to Union Pacific. [See Exhibit 16 and particularly rule 1, reproduced (R. 457), excluded by trial court (R. 317-318).]

(e) Rock Island made no charge to the shipper for supplying the car and received nothing for switching the empty car to the elevator for loading. The inbound movement is considered a part of the outbound loaded car movement (R. 346-347, excluded R. 347).

(f) By its contract with Houlton Grain Company, purchaser of the carload of corn, Kansas Grain contracted to ship each car sent to Houlton Grain "via Union Pacific." [See evidence of James K. Franks, who identified Exhibits 19 and 20 (R. 336-338), exhibits reproduced (R. 465-467), excluded by the court at jury trial (R. 338).]

(g) Rules of the Car Service Division of the Association of American Railroads, to which all defendants were subscribers, which provide that "when empty cars delivered to an industry are loaded to other than the road from which received, they should be interchanged as of the date and time actually or constructively placed." [Application of per diem rules to cars delivered industries and taken out by other than the

delivering road reproduced (R. 421). Excluded by trial court (R. 317-318).]

(h) Interchange Rules of Association of American Railroads, identified as Exhibit 21, which provide that "repairs should be made by car owner insofar as may be practicable" (R. 437), and "empty cars furnished orders for specific lading must be in serviceable condition for such lading, the receiving road to be the judge" (R. 438). Excluded by trial court (R. 351).

Petitioner's evidence to the effect that the car, when inspected was free from defects, was received by the court. At the close of all the evidence, petitioner renewed its motion for directed verdict because:

> "The evidence affirmatively shows that with respect to car R. I. 145287, no relationship of carrier and shipper existed at any time material, between petitioner and Kansas Grain Company, employer of plaintiff, and that defendant Union Pacific was the only defendant as to whom such relationship existed."

This motion was overruled (R. 355).

The trial court submitted the case to the jury against all three defendants but instructed that:

> "A railroad owes to a shipper, such as Kansas Grain Company, a duty to exercise ordinary care to see that the car is in such state of repair that the employees of the shipper, while exercising ordinary care themselves, can enter upon and work about such car with reasonable safety" (R. 375-376).

Petitioner requested and the trial court refused to give instructions which told the jury that by accepting billing, Union Pacific assumed responsibility for the condition of the car from the time that loading was commenced, and the fact that it did not have physical possession of the car, and made no inspection before accepting billing thereon,

did not relieve it of responsibility. (See petitioner's requested instructions 5 and 6, R. 358.)

The court advised the jury that it should return its verdict against the defendant or defendants, found to have been negligent, and that it need not find against all, or in favor of all defendants (R. 370). The jury returned its verdict against petitioner alone, in the sum of $42,890.27, upon which judgment was entered on October 19, 1955 (R. 384-385). While eight forms of verdict were submitted to the jury by the court, no verdict was returned by the jury as to the other defendants (R. 381). Union Pacific and North Western filed motions to amend the verdict, and to alter or amend the judgment (R. 386-391). Petitioner filed motion for new trial (R. 391-403).

Because of the protracted illness of District Judge William F. Riley, who presided at the jury trial, these motions were not heard until August 13, 1956, at which time they were submitted to Circuit Judge Whittaker, sitting by designation as a district judge. Petitioner's motion for new trial was overruled, and the motions of its co-defendants to amend the verdict and for judgment were sustained. The court then proceeded to receive evidence, solely for the purpose of making a record, on petitioner's cross-claims against its codefendants. The evidence which had been offered and excluded upon the jury trial was received, although the court viewed it as immaterial. In addition thereto, petitioner introduced in evidence its Exhibit No. 22, which was circular T71, issued by the Association of American Railroads (to which all defendants were subscribers), which provided in part as follows:

> "It is the obligation and right of the road haul carrier (in this case, Union Pacific), to provide cars for loading on another line in switching service for movement to or via such road haul carrier, except as otherwise provided in paragraph three.

3. It is the obligation of the road performing the switching service to provide equipment under the following conditions:

(a) When cars are to be loaded to a destination within the same switching limits.

(b) When suitable cars owned by the road-haul carrier or other ownerships which may be used in accordance with Car Service Rules are available on loading line within the switching district.

4. A road should not load its own equipment in switch service when such loading is for movement via road-haul connection if such road-haul connection is able to promptly furnish cars which can be used in accordance with the Car Service Rules and which can be delivered for loading if ordered by the switching line. (Such application is in violation of Car Service Rule 1.)" (R. 434-435.)

James K. Franks, traffic manager for Kansas Grain, reidentified Exhibits 19 and 20 and they were received in evidence (R. 465-467). Franks testified:

"I have the numbers of the cars which were loaded at the Kansas Grain Elevator in Council Bluffs on February 10, 1953, and I also have the outbound billing on the days those cars were moved out. There were five cars of corn and one car of oats loaded on February 10, 1953. Of the cars loaded that day, there was one car of oats that moved out on the Rock Island railroad. There were three cars of No. 2 yellow corn billed to Sikeston, Missouri, a point on the Missouri Pacific railroad, one car of corn billed out on the Missouri Pacific to Little Rock, Arkansas, and one car to Denver on the Union Pacific. The Denver car was R. I. 145287" (R. 463).

At the close of petitioner's evidence, its cross-claims against its codefendants were dismissed and judgment was entered in favor of Union Pacific and North Western (R. 483-486).

Upon appeal to the Court of Appeals for the Eighth Circuit, the judgment of the District Court was in all respects affirmed. That court ignored the practice of the grain company of substantially pooling the available cars, and billing them out via lines other than the line from which received and the acquiescence therein by railroads serving the elevator. The Court said that although the box car had been loaded with grain for shipment on the line of Union Pacific from the Council Bluffs elevator to Denver, Colorado:

> "Union Pacific did not have possession of the car and at that time did not know it was to have possession of the car. The North Western had to do only with the switching of the car so as to make it available for loading at the grain elevator. * * * No party to this action other than Rock Island could possibly have been guilty of common law negligence in connection with the inspection of this car."

The Court further said:

> "No cause of action was proved against either the North Western or the Union Pacific and they were entitled to directed verdicts in their favor."

Having held that Rock Island was the only defendant against which any negligence was shown, the Court brushed aside all other errors urged by petitioner. With respect to the action of the court in ordering a trial of the cross-claims of the defendants separate from the trial of plaintiff's action against the defendants, the court ignored the fact that the order for separate trials was not made until the plaintiff's evidence had been concluded, although such fact was pointed out in the briefs below.

The Court of Appeals cited Rules 20 (b), 21, and 42 (b) as expressly authorizing the order for separate trials. The court concluded:

> "These rules give the court broad discretion in these matters of procedure and its ruling will not be disturbed on appeal in the absence of a clear abuse of discretion. In the instant case, we think the court exercised a wise discretion in ordering the issues separately tried."

The Court of Appeals dismissed petitioner's complaint based upon the exclusion of its evidence offered at the jury trial, showing the relationship which existed between the defendants, as relating only to, "agreements entered into by certain railroads in the Omaha-Council Bluffs Switching District." The court said:

> "Plaintiff was not a party to any of these contracts or documents and there is no evidence that he had any knowledge of their existence. His action was not based upon any contract but was an action to recover damages for proximately causing personal injuries suffered by him. * * * Nothing contained in any of these documents could have affected his right to recover for common law negligence."

With respect to the refusal of petitioner's requested instructions numbered five and six, in which petitioner requested the trial court to instruct the jury that by accepting billing on the car, Union Pacific assumed full responsibility for its condition from the time loading was commenced, the court said:

> "We have already held in this opinion that no liability could attach to Union Pacific because of the accident resulting in plaintiff's injuries. * * * The short answer to the complaint is that these requested instructions did not correctly state the applicable law."

ARGUMENT.

The Order for Separate Trials.

In our statement of the case we have pointed out that no intimation was given by the trial court that separate trials of particular issues were contemplated until after more three days of trial, during which plaintiff's evidence was completed. The record thus squarely presents the question:

> Does the discretion to order separate trials of particular issues, vested in a district judge by the provisions of Rule 42 (b), authorize such an order in a jury case, after opening statements of counsel have been made and the evidence of plaintiff completed?

The Court of Appeals answered this question in the affirmative, but gave no consideration to appellant's contention that the time and the conditions under which the order was made disclosed an abuse of discretion by the trial court.

We believe it is essential to a fair trial of any law suit that the parties and their counsel at the outset of the case, have a clear understanding of the issues which are to be tried. This is true because opening statements are made by counsel in the light of the issues upon which evidence is to be offered. Evidence may be relevant and material upon certain issues and not otherwise. Objections to evidence are necessarily made or withheld, depending upon the scope of the issues.

In the absence of an intimation by the court that the issues on trial were to be limited, counsel for petitioner was justified in assuming that the whole case was on trial. It is apparent that had counsel for petitioner understood that the relationship of the various defendants to the car was not to be inquired into, a vastly different opening

statement would have been made. Much of the evidence introduced by plaintiff in this case in chief could and would have been objected to as immaterial and irrelevant, had the issues then been restricted. For example, evidence relating to the movement of the box car subsequent to the time of plaintiff's injury, and its condition when received by Union Pacific would have been neither relevant nor material, if the issues were limited.

The Court of Appeals cites Rules 20 (b), Rule 21 and Rule 42 (b) as granting a broad discretion to the trial court with respect to ordering separate trials of particular issues. This we concede. But we believe such discretion cannot be unlimited. An order for separate trials of particular issues after the evidence of one party has been completed in a jury trial is, we submit, so unusual, and so manifestly unfair, that it should shock the conscience of anyone familiar with judicial proceedings. Had such an order been made in a nonjury case, it would have been irregular, but might not have been prejudicial. In a jury trial, its effect could not be non-prejudicial to defendant. Not only was petitioner unable to introduce evidence discussed in the opening statement of counsel, but it was placed in the intolerable position of being unable to meet or explain the relationship between defendants concerning which plaintiff had introduced evidence. No precedents have been found in cases considering Rule 42 which indicate that such conduct of a jury trial is within the judicial discretion vested in district courts by the rule.

We cannot believe that such procedure can receive the approval of this court. We say, therefore, that the Court of Appeals for the Eighth Circuit has, by its ruling upon this point, sanctioned such a departure from the accepted and usual course of judicial proceedings as to require the exercise of this court's power of supervision. The importance of a clear cut decision by this Court of

the extent to which trial courts may exercise their discretion to order separate trials of particular issues is quite apparent. If the discretion be sufficiently broad to authorize what was done below, the bench and bar should, we believe, be so advised.

The Liability of the Railroads.

The Court of Appeals for the Eighth Circuit has held that Union Pacific had no legal obligation with respect to the condition of the car, although it had acquiesced in the practice of Kansas Grain to load empty cars, supplied by one railroad, for outbound movement over any other railroad, although the car had been loaded for shipment on the line of Union Pacific and although it, shortly after Williams' injury, accepted billing and received the revenue for transporting the car to destination. This ruling seems plainly erroneous, for the very authorities which the Court cites in support of its conclusion state that:

> "A railroad company owes a duty to all persons who are required to go on or about its cars, or cars furnished by it **in connection with its business**, to exercise reasonable or ordinary care to inspect such cars." (75 C. J. S. pp. 333-337.)

We readily concede that if the car, at the time Williams' injury, was being used in connection with the business of petitioner, then it should bear the liability for any defect in the car due to negligence. But, if the car was then being used in the business of Union Pacific, no just rule of law will permit that railroad to reap all the benefits of using the car without assuming liability for defects causing personal injury.

We think the rule of law which governs this case is set forth in The Restatement, Torts, Sec. 392, p. 1064, in which it is said that "one who supplies to another, directly or through a third person, a chattel to be used for

the supplier's business purposes is subject to liability to those for whose use the chattel is supplied" for negligence in failing to inspect, to warn the user of defects, or otherwise exercise reasonable care. Continuing on this same subject the following significant language is found on page 1067 of the Restatement:

> "On the other hand, when everything necessary to the performance of the supplier's contract or the completion of his business dealings is done, the fact that he permits his chattel to be used by those to whom previously he has supplied it for his business use, does not make such further use of the chattel a use for the supplier's business purposes. Where a railroad accepts freight for delivery at its terminal, but on a particular occasion, as a convenience to the consignee, permits him instead of unloading the car at its terminal, to arrange for transportation of the car to his place of business by a connecting carrier, the transportation of the car by the connecting carrier is not a use for the railroad's business purpose."

The record here shows that the car was used by the Grain Company in all respects as though it had been supplied by Union Pacific, pursuant to a custom and practice in which all railroads concurred. After the elevator employees started to load the car for outbound movement via Union Pacific, the car was no longer used in petitioner's business and under the Restatement, its responsibility ended.

Williams' injury occurred in Iowa, and under Erie Railroad v. Tompkins, 304 U. S. 64, 84 L. Ed. 1188, the law of that state governs. The Iowa Supreme Court in the recent case of Jackson v. C. M. St. P. & P. R. R. Co., 238 Iowa, 1253, 30 N. W. (2d) 97, has recognized the rule for which we contend. In that case the Milwaukee Railroad supplied a car, owned by Nickel Plate Railroad, to a shipper

for loading with soy beans, and transported it from point of origin to Des Moines where it was delivered to another railroad. In affirming a judgment against the Milwaukee Road in favor of an employee of the consignee, for an injury sustained when the car door fell upon him, the Iowa Court said:

> "When an initial carrier furnishes a car to a shipper to be loaded with freight and then delivered to a consignee whose servants are to unload the car, it is charged with the duty to exercise ordinary care to see that the car is in such state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of unloading it. * * * (Citing cases.)
>
> "It is not material that the car in question was the property of the Nickel Plate Railroad. Defendant had assumed control of it and was as much responsible for its condition as for one of its own cars." (Citing cases.)

The Court of Appeals in its opinion cites and relies upon the Jackson case from the Iowa Supreme Court to support its conclusion that the petitioner was primarily, and exclusively, liable for the condition of the car. It ignores the language of the Iowa decision that it is **"the duty of the initial carrier"** to exercise care to furnish a safe car for loading. We think the Iowa Supreme Court used the words "initial carrier" advisedly, and did not mean thereby that any railroad supplying a car to an industry is liable, even though the car has been loaded for movement over an entirely different railroad. In the case at bar Union Pacific was the initial carrier, and so, we believe, was primarily liable to Williams under the Jackson case. There is no other Iowa decision on the point.

In the proper functioning of our dual judicial system of state and federal tribunals this Court has many times said

it is necessary that the courts of the United States adhere to and carefully follow the applicable state law. The federal courts, certainly, should not attempt to apply their own ideas of what state law should be in deciding tort cases arising under diversity of jurisdiction. In the case at bar we think the lower courts either completely disregarded the Jackson decision, or did not follow the plain language of the Iowa opinion, because they felt the Iowa court meant to say something very different from what actually appears on the printed page. It is quite impossible to harmonize the statement of the Iowa court that the duty of exercising care to supply reasonably safe cars is imposed on the "initial carrier," with the conclusion of the Court of Appeals that the initial carrier, in the case at bar, was entitled to a directed verdict.

Not only has the Court of Appeals ignored and misapplied the law of Iowa in its decision in this case, but its opinion also conflicts with the pronouncements of the Courts of Appeal of other Circuits on the same subject, and with the decisions of practically all state courts of last resort. These courts hold that a railroad is under obligation to use care to supply to a "shipper" cars free from defects for loading "in connection with its business" or "to be shipped over its line." These words can mean but one thing—there must be a shipper-carrier or carrier-consignee relationship out of which the duty arises. In the case at bar that relationship is absent as to petitioner, but present as to Union Pacific.

Thus, in **Pennsylvania Railroad Company v. Hummel**, 167 F. 89, the railroad company sent to the wharf of I. D. Thomas & Son, box cars to be loaded with merchandise for shipment by that firm over the railroad's line. The Court of Appeals for the Third Circuit, in sustaining a judgment in favor of an employee of the shipper, said:

> "The contract between defendant and Thomas & Son created the condition out of which the duty of the defendant to the plaintiff arose, but the plaintiff's right of action was founded on that duty—a duty imposed by the law and not on the contract."

In **Waldron v. Director General of Railroads**, 266 F. 196, it appeared that a railroad serving a mine supplied cars with defective brakes for loading of coal on a track with a heavy down grade which required that the cars be equipped with good brakes. The Court of Appeals for the Fourth Circuit there said:

> "A carrier furnishing cars to be loaded for shipment is liable for injuries to the shipper or his employee due to a defect in car which might have been discovered by reasonable care and inspection."

The Court of Appeals for the Eighth Circuit used similar language in the cases of **Copeland v. C. B. & Q. RR. Co.**, 293 F. 12, and in **St. Louis-San Francisco RW. Co. v. Ewan**, 26 F. 2d 619. Numerous cases from other circuits using similar language might be cited.

At times it has been suggested by counsel for Williams and other respondents that, since petitioner was called upon to switch the car back to Union Pacific, such fact constitutes a basis for holding that the car was being used in petitioner's business when Williams was hurt. This contention ignores the fact that petitioner acted as a mere switching railroad in handling the out bound car. It was hired by Union Pacific to shunt the car from the elevator to the nearest Union Pacific track in Council Bluffs, and for this service it was paid by Union Pacific, which, by tariff, "absorbed" petitioner's charge for its service. Petitioner was not a carrier named in the bill of lading. Union Pacific was both the initial and the delivering carrier.

A switching railroad which performs the service of switching a car from an industrial side track to the line of railroad over which the car is billed, is not a carrier, but a mere agent of the "line haul" carriers named in the bill of lading. Such was the holding of this court in Missouri Pacific Railroad Company v. Reynolds-Davis Grocery Company, 26 U. S. 366, 69 L. Ed. 1000. There a carload of sugar was shipped from a point in Louisiana to Ft. Smith, Ark., on a through bill of lading, which designated several railroads, the last of which was the Missouri Pacific. Missouri Pacific served Fort Smith, but the consignee's warehouse was located on a siding served by St. Louis-San Francisco Railroad. Missouri Pacific turned the car over to the Frisco line for spotting at the warehouse and paid the switch charge of the Frisco. While the car was in the possession of the Frisco line, part of the sugar was lost. The Missouri Pacific contended that it was not the delivering carrier and, therefore, not liable under the Federal statute for loss of the shipment. This court, speaking by Mr. Justice Brandeis, said:

> "Its (Missouri Pacific) lines enter Ft. Smith, but do not extend to the consignee's warehouse. It employed the St. Louis-San Francisco to perform the necessary switching service. And it paid therefor $6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading, and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such."

The courts have had occasion to consider the relation between a switching railroad, in a terminal area, and a line-haul carrier on but few occasions. In each instance in which the matter has been considered the holding has been that a switching railroad whose charges are absorbed or

paid by the line-haul railroad is under no liability to a consignor or consignee of freight.

Shapiro v. Boston & Maine R. R. Co., 99 N. E. 459, 213 Mass. 70;

St. L. & S. W. R. R. Co. v. Jackson & Co., 118 S. W. 853 (Tex. Civ. App.);

Houston E. & W. Texas Railway Co. v. Packing Co., 221 S. W. 316 (Tex. Civ. App.).

The Interstate Commerce Commission has frequently dealt with reciprocal switching rates in cases involving services of the character performed by petitioner in the case at bar, and has consistently held that the switching road acts merely as an agent of the line-haul railroad named in the billing.

Mitchell Chamber of Commerce v. C. M. & St. P. Ry. Co., 129 I. C. C. 451, 456;

Live Stock at Chicago, 213 I. C. C. 330, 341;

R. W. Burch, Inc., v. Railway Express Agency, 201 I. C. C. 51, 52;

Reciprocal Switching at Mobile, 208 I. C. C. 151, 155.

Numerous cases might be cited from various state courts of last resort which hold that it is a **carrier's** duty to supply to a **shipper** cars reasonably free from defects. A railroad company may or may not be a carrier, and a shipper, of course, is never a shipper, except as to the carrier with which it does business. One very pertinent decision from the Pennsylvania Supreme Court recognizes the rule for which we contend.

In Rick v. N. Y. C. & St. L. R. R. Co., 81 Atlantic 650, the opinion shows Union Rolling Mills was located within the Cleveland, Ohio, switching district, but was served by a switch track of Erie Railroad Company. A car was loaded with bar iron at the rolling mill, billed over defendant's line to Girard, Pa., and spotted on the consignee's

private siding. Rick, consignee's employee, while unloading the iron, was injured by a defect in the car. One of the contentions advanced by defendant was that the car was supplied by Erie Railroad Company, and that it had no chance to inspect the interior of the car prior to receiving it in a switching movement from the Erie. The Pennsylvania Supreme Court rejected the contention, and, in the course of its opinion, said:

> "It is immaterial who owned the car in question. It was furnished for the purpose of carrying the iron which the defendant company, in consideration of the freight charges paid it for the entire distance, agreed with the consignor to transport from Cleveland to Girard. Its contract required it to take the iron loaded at the mills; and hence it must be assumed, in the absence of evidence to the contrary, that it did so by the use of the car in which the iron was loaded and transported to its destination. The fact that the Erie Company did the switching to place the car on the defendant's tracks does not prove that it furnished the car, or that the defendant company did not furnish it, or relieve the latter company from its duty to have the car efficiently inspected and kept in proper repair. The Erie Company had no contract with the Rolling Mills Company or its sales agent to carry the iron from Cleveland to Girard. That company simply switched the car from the mill to the track of the defendant company, which, by its bill of lading, agreed to transport the iron from Cleveland to its destination."

The courts below have held that Union Pacific made the car its own, and became responsible to employees of the shipper for defects therein, only by signing the bill of lading. This ignores the fact that loading of the car is a necessary part of its transportation, and an integral part of the movement from the elevator at Council Bluffs

to destination at Denver. Under this ruling a railroad carrier is never liable to employees of a shipper for defects in a car unless it has supplied the car, or actually signed the bill of lading. The patent fallacy of such a rule is apparent when we consider that a railroad carrier would thereby escape liability for injury to a shipper's employee if it did not supply the car, but would be liable if it furnished the car itself. We submit that such splitting of a railroad's responsibility for the condition of cars used in its business is both illogical and impractical. Under this rule, if a car were shipped to the elevator on one railroad, the grain unloaded, and the car reloaded for outbound shipment over another railroad, neither railroad would be responsible for the condition of the car while being reloaded.

We believe that the foregoing authorities demonstrate that petitioner at the time of Williams' injury was making no business use of the car and was under no liability to Williams. By its requests for instructions numbered 5 and 6 petitioner presented to the trial court the legal issue that if it was under any liability to Williams, Union Pacific was also jointly liable. The requests were denied by the trial court. The Court of Appeals sustained the trial court because Union Pacific was entitled to a directed verdict. If Union Pacific was under any obligation with respect to the car this was error, prejudicial to petitioner, because Iowa law permits contribution between joint tort-feasors. Best v. Yerkes, 77 N. W. (2d) 23. (Not yet published in Iowa Reports.)

We think the Court of Appeals for the Eighth Circuit has erroneously decided an important question, involving the construction and application of Rule 42, Federal Rules of Civil Procedure, which should be reviewed and determined by this Court. That the question is of general importance in the administration of Rule 42 is obvious. The stage of the trial at which the order was made, pre-

sents, we believe, not only an abuse of discretion, but a denial of fundamental rights which the Rule was intended to protect. It is equally plain that in holding Union Pacific entitled to a directed verdict, the Court of Appeals did not follow the decision of the highest court of the State of Iowa upon the question. We believe that the case is one in which this Court should exercise its discretion to review and decide both the procedural and substantive questions of law presented by the record.

Petitioner therefore prays that certiorari be granted.

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APPENDIX A.

Opinion.

United States Court of Appeals.
For the Eighth Circuit.

No. 15,662

Chicago, Rock Island and Pacific Railroad Company, a Corporation, Appellant,

vs.

W. E. Williams, Chicago and Northwestern Railway Company, a Corporation, and Union Pacific Railroad Company, a Corporation, Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

[June 6, 1957.]

A. B. Howland (Oscar E. Johnson, Robert M. Stuart and B. A. Webster, Jr., were with him on the brief), for Appellant.

Harold T. Beckman (John LeRoy Peterson was with him on the brief), for Appellee, W. E. Williams.

J. H. Anderson (F. J. Melia, G. C. Holdrege, F. J. Given and Addison C. Kistle were with him on the brief), for Appellee, Union Pacific Railroad Company.

Ray H. Johnson, Jr. (Frank W. Davis and Davis, Huebner & Johnson were with him on the brief), for Appellee, Chicago and Northwestern Railway Company.

Before Gardner, Chief Judge, and Vogel and Van Oosterhout, Circuit Judges.

Gardner, Chief Judge.

This was an action sounding in tort brought by appellee William E. Williams against the Chicago, Rock Island and Pacific Railroad Company, the Chicago and Northwestern Railway Company and the Union Pacific Railroad Company to recover damages on account of personal injuries suffered by plaintiff while he was attempting to close a door on a box-car owned by the Chicago, Rock Island and Pacific Railroad Company. He charged the three named railroad companies jointly and severally with negligently furnishing plaintiff's employer, the Kansas Grain Company, with a box-car whose door and track mechanisms were in a broken, dangerous, defective, unsuitable and unsafe condition. The defendants answered separately each admitting the occurrence of the accident resulting in plaintiff's injuries but denying they were guilty of negligence, and the Rock Island also pleaded contributory negligence and it filed cross-claims against the Northwestern and Union Pacific. As against the Northwestern it prayed that "* * * in the event that any liability be established against either this defendant or Chicago & Northwestern Railway Company, the court adjudicate, declare and determine the rights of the respective defendants as between themselves and thereupon determine that any liability established by or against either this defendant or Chicago & Northwestern Railway Company constitutes a part of the cost of the switching operation on or over the River Track and is to be borne and shared equally by the three parties to the contract of November 21, 1910, or in the alternative that the court find, declare and determine that the primary liability, therefore, is upon Union Pacific Railroad Company, and that upon payment of any judgment or any part thereof which may be rendered against this defendant or defendant Chicago & Northwestern Railway Company, either or both of said defendants shall be entitled to judgment over against

Union Pacific Railway Company." In its cross-claim against the Union Pacific it prayed: "1. That this court find, determine and adjudicate that as between defendant Chicago, Rock Island & Pacific Railroad Company and defendant Union Pacific Railroad Company, Union Pacific Railroad Company is primarily liable to plaintiff and that this defendant is in no manner liable for plaintiff's injuries; in the event that any liability is imposed on this defendant that the court find, determine and adjudicate that the primary liability therefor rests upon defendant Union Pacific Railroad Company and not upon this defendant. 2. That if any judgment be rendered against this defendant in favor of the plaintiff in this action that the court find, determine and adjudicate that on payment thereof that this defendant is entitled to judgment over against defendant Union Pacific Railroad Company * * *." In due course these cross-claims were answered separately by the Northwestern and the Union Pacific. The issues joined by the plaintiff and the defendants were separately tried before the court and a jury and the jury found the issues in favor of the plaintiff and against the Rock Island alone. The issues joined between the railroad defendants were thereafter tried by the court and were determined in favor of the Northwestern and the Union Pacific.

The defendants are referred to in the record and briefs as the Rock Island, the Northwestern and Union Pacific and they will be so designated in the course of this opinion.

At all times pertinent to the issues here involved William E. Williams, plaintiff, was in the employ of the Flour Mills of America, Inc., operating a one and one-half million bushel capacity grain elevator in Council Bluffs, Iowa under the trade name of Kansas Grain Company. This grain elevator was served by lead tracks or spurs owned by the Northwestern.

On January 28 and 29, 1953, Kansas Grain Company placed orders with the Rock Island for thirty-five empty cars for grain loading. Thereafter, on February 7, 1953, one Bert Neumann, a Rock Island employee at Council Bluffs, inspected car RI 145287 and placed thereon a placard reading "OK—Grain". On the morning of February 9, 1953, this car was taken to the so-called River Track by the Rock Island and later that day was switched to Kansas Grain elevator by the Northwestern. When plaintiff Williams came to work on the morning of February 10 this car was one of several on the elevator loading track and during the afternoon of that date, he loaded the car with 112,000 pounds of shelled corn and it was then moved to the east on the loading track eighty to one hundred feet where Sigler, another employee of the elevator, took samples of the grain and closed and sealed the door on the southerly side of the car. Williams, observing that some difficulty was encountered in attempting to close the door on the northerly side of the car, suggested that he would take over closing that car door while Sigler secured samples from another car which Williams had just finished loading. Williams and Rounds, another elevator employee, attempted to close the door. Williams first pried at the westerly end of the door with an iron bar some three feet in length and was able to move the door only a short distance to the east in this manner. A chain with a ring on one end was then secured, passed around the handle of the door, the bar was passed through the ring and placed against the easterly side of the door-stop at the east door opening and the door was moved some two or three feet in this manner to within eighteen inches of being closed. Williams then laid the bar down and engaged in some further conversation with his co-employee when a popping or cracking noise was heard. Rounds shouted, "Look out," and Williams looked up and saw that the car door was out of the door track at the top some two feet and was falling outward. The door fell on

Williams. It weighed some eight hundred to one thousand pounds. Williams sustained injuries consisting of three fractured vertebrae, a fracture of the tibia and fibula of his right leg, the loss of teeth and multiple contusions, abrasions and lacerations about his head, legs and body.

In this type of box-car normaliy the top of the door is held next to the car by a door-cap which extends down over the edge of the door and is equipped with a guide going outside the cap in order to keep the door in a rigid position. The door-cap serves as a guide or track to the upper part of the door. The door is opened and closed by moving it along a rail known as the lower door-track. The movement of the door is facilitated by the lowering of a roller located near the lower edge of the door onto the door-track. In the absence of defects, the top of the door extends into the door-cap about one inch.

Evidence introduced by the plaintiff warranted the jury in finding that the lower door-track and side-sill of this car, at the time of the occurrence, was sagged about three-fourths of an inch. The weld was broken between the lower door-track and the left-hand door-stop. The siding of the car at the lower right-hand corner of the door-opening was pulled away from the floor. The right-hand door-post was broken beneath the lower door-rail and the width of the break was approximately three-quarters of an inch. These were old breaks. The function of the door-post is to connect the lower underframe with the upper roof section and the purpose is to bind the top to the bottom underframe of the car in a rigid position. The breakage of the post would have a tendency to allow the side sill to sag or create an excessive amount of distance between the lower door-track or door-rail and the upper door-cap.

There was testimony produced on behalf of the Rock Island conflicting with that offered on behalf of plaintiff as to the condition of the car door when it was delivered

to plaintiff's employer but we assume the conflict was resolved by the jury in favor of plaintiff. There was also testimony offered by defendant Rock Island going to the extent of plaintiff's injuries.

On the day following the accident a bill of lading for shipment of said car from Council Bluffs, Iowa, to Denver, Colorado, was prepared by employees of Kansas Grain Company at Omaha, Nebraska, and received by the Union Pacific on such date. The car was then removed by an engine crew of the Northwestern, taken by the Rock Island to its Council Bluffs repair track where the door was replaced and held by the Rock Island until it was switched to the tracks of the Union Pacific on February 23, 1953, at which time the Union Pacific for the first time took physical possession of the car. The car was inspected by the Union Pacific on February 24, 1953, and "bad ordered" at that time for worn brake heads and because one of its doors was out of the top door track. Repairs were completed on February 24, 1953, and the Union Pacific thereupon transported the car to Denver, Colorado, over its own line of railroad. The evidence will be further developed in the course of this opinion.

At the close of plaintiff's evidence in chief each of the defendants separately moved for a directed verdict which motions were denied and at the close of all the testimony these motions were renewed and were again denied and the case was submitted to the jury on instructions to which certain exceptions were saved by the defendant Rock Island. The jury returned a verdict in favor of plaintiff and against the Rock Island alone in the sum of $42,890.27, pursuant to which the court entered judgment.

As has been observed the Rock Island laid the basis for challenging the sufficiency of the evidence to sustain the verdict by moving for a directed verdict in its favor at the close of all the evidence. It is to be noted, however,

that in its brief the sufficiency of the evidence to establish negligence in the inspection of its box-car here involved is not challenged. It bases its claim for reversal not on the fact that there was lack of proof of common-law negligence, which was the proximate cause of plaintiff's injuries, but on the ground that it could not be held responsible for the negligence of its employees in inspecting the box-car furnished plaintiff's employer because the relationship of shipper and carrier, or carrier and consignee, did not exist at the time of the accident. Its contention in this regard is stated in its brief as follows:

> "The contention of appellant is that Rock Island was under no duty to supply Kansas Grain Company with boxcars for shipments to be made over the line of Union Pacific; that the duty to exercise care to supply a reasonably safe and suitable boxcar arises out of the relationship of shipper and carrier, or carrier and consignee. Since plaintiff's injury occurred while the car was being loaded for outbound movement via Union Pacific, that line, by accepting the billing, necessarily assumed responsibility for the car, at least from the time that loading was commenced."

It will be recalled in this connection that thirty-five box-cars were requisitioned by the Kansas Grain Company from the Rock Island to be loaded with grain for shipment over various railroad lines. The car was inspected by the Rock Island and marked "OK—Grain." It was then loaded and subsequent to being loaded the plaintiff attempted to close the northerly door with disastrous results. The Union Pacific did not have possession of the car and at that time did not know it was to have possession of the car. The Northwestern had to do only with the switching of the car so as to make it available for loading at the grain elevator. Plaintiff's action is based upon common-law negligence and not upon breach of any contract. No party to this action other than the Rock Island could

possibly have been guilty of common-law negligence in connection with the inspection of this car. It was its car and it inspected it and in effect commended it as fit for use. In these circumstances we think it was responsible for the results of its negligence in this regard. **Jackson v. Chicago, M., St. P. & P. R. Co.**, Ia., 30 N. W. 2d 97; **Pennsylvania R. Co. v. Hummel**, 3 Cir., 167 F. 89; **Copeland v. Chicago, B. & Q. R. Co.**, 8 Cir., 293 F. 12; **St. Louis-San Francisco Ry. Co. v. Ewan**, 8 Cir., 26 F. 2d 619; 75 C. J. S., Railroads, Sec. 924, p. 333. In **Jackson v. Chicago, M., St. P. & P. R. Co.**, supra, the Supreme Court of Iowa had occasion to consider a case in which the facts were quite similar to those in the instant case except that in the Iowa case the car was furnished by the initial carrier. In the course of the opinion it is said, inter alia:

> "When an initial carrier furnishes a car to a shipper to be loaded with freight and then delivered to a consignee whose servants are to unload the car, it is charged with the duty to exercise ordinary care to see that the car is in such state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of unloading it. (Citing cases.)
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> "Plaintiff as an employee of the consignee stood in the position of an invitee to whom defendant owed the duty of reasonable care. **Spears v. New York Cent. R. Co.**, 61 Ohio App. 404, 22 N. E. 2d 634, 637; **Corbett v. New York C. & H. R. R. Co.**, 215 Mass. 435, 102 N. E. 648; **Ryan v. New York, N. H. & H. R. Co.**, C. C. N. Y., 115 F. 197; **Louisville & N. R. Co. v. Freppon**, supra, which also holds an employee of the consignee has a right to assume a freight car delivered the consignee for unloading will be reasonably safe for his use.
>
> "It is not material that the car in question was the property of the Nickel Plate Railroad. Defendant had

assumed control of it and was as much responsible for its condition as for one of its own cars. (Citing cases.)

"'The right of a servant of a consignee to recover for injuries sustained by reason of defects in a car which he was engaged in unloading has frequently been affirmed.' Anno. 41 A. L. R. 8, 125-127."

What is said by us in **St. Louis-San Francisco Ry. Co. v. Ewan,** supra, is a persuasive if not controlling answer to the contention of the Rock Island in this case. We there said:

"* * * It is a carrier's duty to use ordinary care to deliver cars reasonably safe for the use of shippers and their employees while the cars are being loaded or unloaded. **Copeland v. Chicago, B. & Q. R. Co.** (C. C. A.), 293 F. 12, 15. The employer's duty to provide for the employee a safe place in which to work may be added in the circumstances but does not supplant the carrier's duty. 'The carrier cannot impose this duty to furnish cars reasonably safe on the shipper, to its own relief from liability for injuries to an employee of the shipper. If the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employee to be loaded, the carrier and shipper are both liable to the injured employee; for the proximate cause of the injury is the defective car. But as between the carrier and the shipper the liability of the carrier is primary, for the reason that the shipper has a right to assume that cars furnished have been inspected by the carrier and found reasonably safe.' **Waldron v. Director General of Railroads** (C. C. A.), 266 F. 196, 198.

"2. The liability of the carrier does not arise out of contract but out of a duty imposed by law. **Penn-**

sylvania Railroad Co. v. Hummel (C. C. A.), 167 F. 89, 94. That duty extends, not only to the shipper, who has actually entered into contract with the carrier, but to the employee of that shipper, although, of course, there is no contract between employee and the carrier. Waldron v. Director General of Railroads, supra; Pennsylvania Railroad Co. v. Hummel (C. C. A.), 167 F. 89, 94. Nor is the duty restricted to the employees of the shipper having a contract with the carrier. As this court said in Copeland v. Chicago, B. & Q. R. Co., supra, it extends to those 'who are to handle the freight in and out' of the cars. Therefore in this case it extended to the plaintiff, even although the contract with the defendant was not directly with the plaintiff's employer, but with that employer's selling agent, the Mackie-Clemens Company. The employer, the Quality Coal Company, was the shipper, and the cars were furnished by the defendant for its use. The duty of the defendant certainly extended to that company and its employees."

The applicable law is aptly stated in Corpus Juris Secundum, supra, as follows:

"A railroad company owes a duty to all persons who are required to go on or about its cars or cars which are furnished or delivered by it in connection with its business to exercise reasonable or ordinary care to inspect such cars, and to have them in such repair or condition that they may be used with reasonable safety, or to give notice or warning of defects in such cars which are discoverable by due inspection to persons who are entitled to such notice or warning. These duties may be owing to the shipper and to his employees, with respect to loading, or to the consignee, and to his employees, with respect to unloading. A breach of duty of this nature constitutes negligence, and, for such a breach, the railroad company may be

liable for resultant injury to the person to whom the duty is owing, including the shipper, an employee of the shipper, any other person rightfully about the car in connection with loading or shipment, the consignee, or an employee of the consignee. The liability of the railroad company to a shipper's employee for furnishing a defective car arises ex delicto and not ex contractu, and the duty does not depend on the existence of a contract relationship."

In the instant case the Rock Island not only furnished the car but it owned the car and inspected the car and represented that it was in good order.

In its motion for a directed verdict the Rock Island sought to have the court not only exonerate it from responsibility but to hold the defendant Union Pacific liable. Thus it was urged in its motion that "* * * defendant Union Pacific Railroad Company by its acts and conduct, and by accepting billing on the car in question elected to have switching service performed for its account by the defendant Chicago, Rock Island and Pacific Railroad Company, and thereby necessarily assumed responsibility for the injury and damage which was sustained by plaintiff in this action." It thus appears that the Rock Island was contending that the Union Pacific was primarily liable because it accepted billing on the car. It has already been observed that the Union Pacific did not accept billing on this car until the day following the accident. Until after that time it had not had physical possession of the car, it had no control over the car, it had no opportunity to inspect the car and it had no duty to inspect the car, it did not even know the car was to be billed over its line of railroad and it certainly had no duty to perform relative to its condition until it had possession under a bill of lading. In these circumstances it could not be held to be guilty of common law negligence with reference to the

condition of this car. We conclude that the court committed no error in denying the Rock Island's motion for a directed verdict.

The Rock Island complains of the ruling of the court in denying its motion to quash plaintiff's request for admission No. 26 and in overruling its objections to plaintiff's request for admissions Nos. 24, 25, 26 and 27, when offered in evidence. The request was made by plaintiff pursuant to Rule 36, Federal Rules of Civil Procedure. This rule among other things requires that "Each of the matters of which an admission is requested shall be deemed admitted unless * * * the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement * * * or (2) written objections * * *." The Rock Island failed to comply with this rule and the court correctly held that by so failing it admitted the truth of the inquiries. The court properly overruled the motion to quash. Rule 36, Federal Rules of Civil Procedure; **Batson v. Porter,** 4 Cir., 154 F. 2d 566; **Beasley v. United States,** D. C. E. D. S. C., 81 F. Supp. 518; **United States v. Laney,** D. C. E. D. S. C., 96 F. Supp. 482. In passing it is to be noted that the Rock Island made requests for admissions as to the history and movement of this car, particularly while in possession of the Union Pacific, subsequent to the accident from the place where the accident occurred to its destination. That the car had received further repairs before it was transported by the Union Pacific was only a part of the history of the handling of the car by the Union Pacific. The court in overruling the objection to the admission of plaintiff's request for admissions said:

> "In order that there may be no misunderstanding, I am going to show the whole history of the movement of this car and I will therefore overrule the objection. I want it for the benefit of the court as well."

The mere fact that the Union Pacific may have made some further repairs on this car was not an admission of any negligence on the part of the Rock Island. The court in its instructions definitely limited the inquiry of the jury to the incident forming the basis of plaintiff's injury and the claim of negligence. The admission of the evidence as to this incident could not be said, under these circumstances, to be prejudicial.

It is next argued that the court erred in ordering a trial of the cross-claims of the defendants against each other separate from the trial of plaintiff's action on its merits. As has been observed the court proceeded to try the action as brought by plaintiff separate from the issues raised by the defendants by their various cross-claims. We think the ruling of the court in this regard was eminently proper. Rule 20 (b), Rule 21 and Rule 42 (b), Federal Rules of Civil Procedure; **Meyercheck v. Givens**, 7 Cir., 180 F. 2d 221; 3 Moore's Federal Practice 2908. Rule 20 (b), supra, provides as follows:

> "The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him; and may order separate trials or make other orders to prevent delay or prejudice."

Rule 21, supra, provides in part as follows:

> "* * * Any claim against a party may be severed and proceeded with separately."

Rule 42 (b), supra, provides as follows:

> "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

These rules give the court broad discretion in these matters of procedure and its ruling will not be disturbed on appeal in the absence of a clear abuse of discretion. In the instant case we think the court exercised a wise discretion in ordering the issues separately tried.

On the trial before the jury the Rock Island proffered testimony in various forms as to numerous agreements entered into by certain railroads in the Omaha-Council Bluffs switching district. These offers were rejected and the Rock Island urges the rulings as reversible error. We cannot agree. Plaintiff was not a party to any of these contracts or documents and there is no evidence that he had any knowledge of their existence. His action was not based upon any contract but was an action to recover damages for proximately causing personal injuries suffered by him. The action was ex delicto and not ex contractu. Nothing contained in any of these documents could have affected his right to recover for common law negligence. They had reference to the issues of contribution or indemnity which only became pertinent and material in the event an adverse verdict was returned against one or more of defendant railroads and the court repeatedly advised counsel for the Rock Island that the exclusion of the proffered testimony did not mean that such evidence would be considered immaterial or irrelevant on trial of the issues between defendants on their cross-claims. Their introduction in evidence could only have confused the jury.

The Rock Island complains that the court erred in giving instructions numbered 17 and 3½. Instruction No. 17 in effect told the jury that they might find a verdict for or against one or more of the defendants. If this was error it was error in favor of the Rock Island because on the undisputed evidence the Northwestern and the Union Pacific were entitled to directed verdicts in their favor. Instruction No. 3½ also told the jury that they might find

a verdict against any or all of the defendants. Here again the instruction was favorable to the Rock Island because the other defendants were, under the undisputed evidence, entitled to verdicts in their favor. The claim of prejudicial error in giving the instructions is wholly without merit.

Complaint is also made that the court refused to give the substance of instructions numbered 5, and 6 requested by the Rock Island, which asked the court to advise the jury as to the legal effect of the action of the Union Pacific in accepting billing on the car on February 11, 1953, after plaintiff was injured. We have already held in this opinion that no liability could attach to the Union Pacific because of the accident resulting in plaintiff's injuries. It cannot therefore be consistently argued that the refusal to give these instructions was erroneous. The short answer to the complaint is that these requested instructions did not correctly state the applicable law.

The Rock Island separately argues that it was error for the court to dismiss its cross-claims against the Northwestern and the Union Pacific. As heretofore stated no cause of action was proved against either the Northwestern or the Union Pacific and they were entitled to directed verdicts in their favor. In this case the jury found the Rock Island guilty of common law negligence in furnishing a box-car which it had inspected and marked as in good order whereas it was in fact in bad order. It was guilty of primary negligence. By its cross-claims it sought indemnity or contribution from its co-defendants. None of the contracts or other evidence introduced by Rock Island in support of its cross-claims specifically provided for indemnity for damages resulting from its own negligence. There was, of course, no contract of indemnity between the Rock Island and other carrier parties to the contracts. The only agreements between the parties were as to traf-

fic matters such as agreements relating to interchange, per diem, etc. No reference whatsoever is made in such agreements as to indemnity of any kind, let alone for personal injury or indemnification against the consequences of another railroad's negligence. A contract for indemnity against the consequences of one's own negligence must be clear and definite in its provisions. 42 C. J. S., Indemnity, Sec. 5, p. 569 and Sec. 12, p. 580; 27 Am. Jur., Indemnity, Sec. 15, p. 464. In Corpus Juris Secundum, Sec. 5, supra, the rule is stated as follows:

> "The language employed must clearly and definitely show an intention to indemnify against a certain loss or liability, otherwise it is not a contract of indemnity * * *."

As we have observed it is definitely determined in this case that the Rock Island was the active perpetrator of the wrong resulting in plaintiff's injuries. In these circumstances it is not entitled to indemnity. **Rozmajzl v. Northland Greyhound Lines**, Ia., 49 N. W. 2d 501; **Lewis v. United Air Lines Transport Corporation**, D. C. Conn., 34 F. Supp. 124; **Lebeck v. William A. Jarvis, Inc.**, D. C. E. D. Pa., 145 F. Supp. 706. The principle is well expressed in **Lewis v. United Air Lines Transport Corporation**, supra, as follows:

> "But Air Lines overlooks the well-established rule that one whose active negligence has been adjudicated cannot, in an action over, invoke the judgment as proof of his liability to the tort claimant and still escape its effect as a determination of his own primary liability precluding any recovery over."

Numerous other defenses to Rock Island's cross-claims are persuasively argued in the briefs of Northwestern and Union Pacific but as the principle here invoked seems conclusive further consideration of the question would unduly

extend this opinion and serve no useful purpose. We are clear that it was not error to dismiss the Rock Island's cross-claims against these defendants.

It is finally argued that the verdict is excessive. There was evidence from which the jury could reasonably have found that plaintiff's injuries were permanent and that they consisted of three fractured vertebrae, fractures of the tibia and fibula of his right leg, loss of teeth and multiple contusions, abrasions and lacerations about his head, legs and body. There was evidence that at the time of his injuries plaintiff was a man fifty-eight years of age earning from $40 to $76 per week and had a life expectancy of 15.77 years; that he was totally disabled from February 10, 1953, until June 30, 1954; that his loss of wages amounted to approximately $4,400; that his medical and hospital expenses totaled $1,700, and that his permanent partial disability was approximately twenty per cent.

While the verdict is a large one, certainly in view of these facts it could not well be held that the verdict was so excessive as to be monstrous or to shock the judicial conscience. But quite aside from these considerations we have consistently held "that the responsibility for keeping jury awards within reasonable bounds is essentially that of the trial court and not that of this court," and we will not reverse on the ground of excessive verdicts in tort cases such as this. **Railway Express Agency v. Epperson**, 8 Cir., 240 F. 2d 18[illegible] **Glendenning Motorways v. Anderson**, 8 Cir., 213 F. 2d 432; **National Alfalfa Dehydrating & Mill. Co. v. Sorensen**, 8 Cir., 220 F. 2d 858; **St. Louis Southwestern Ry. Co. v. Ferguson**, 8 Cir., 182 F. 2d 949; **Zimmerman v. Mathews Trucking Corp.**, 8 Cir., 203 F. 2d 864. In **Glendenning Motorways v. Anderson**, supra, we said:

> "We have consistently held that in a tort action the question of the excessiveness of a verdict is a ques-

tion to be determined by the trial court on motion for new trial and cannot be considered as ground for reversal."

We have considered all the other contentions urged by appellant in its brief and find them without merit. Convinced as we are that no error prejudicial to appellant was committed by the trial court in the trial of this action the judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment of the Court of Appeals for the Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1956.

Thursday, June 6, 1957.

Chicago, Rock Island and Pacific Railroad Company, a Corporation,
Appellant;
vs.
W. E. Williams, Chicago and Northwestern Railway Company, a Corporation, and Union Pacific Railroad Company, a Corporation.
No. 15,662.

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 6th, 1957.

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In the Supreme Court of the United States

October Term, 1957

No. 367

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY, and CHICAGO & NORTH WESTERN RAILWAY COMPANY,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS RESISTING PETITION FOR CERTIORARI

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Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS RESISTING PETITION FOR CERTIORARI

Respondents, W. E. Williams and Union Pacific Railroad Company, have filed briefs resisting the petition for certiorari. Respondent, Chicago and North Western Railroad Company, has advised counsel for Petitioner that no resistance will be filed on its behalf.

Respondents' resistances to the petition for certiorari demonstrate, we believe, that this Court should exercise its discretion to review the judgments of the Courts below, so that an authoritative and final determination of the scope of Rules 20, 21, 38 and 42(b) may be laid

down for the benefit of the legal profession, and Federal tribunals administering these rules. Respondents' Briefs also demonstrate the importance to the public of a review by this Court of the questions of petitioner's liability and that of Union Pacific for the injuries suffered by respondent Williams.

I.

Under this division of their resistances both respondents contend that although Williams filed timely demand for a jury trial "of any issue in the above entitled cause triable of right by a jury" (see R. 18) his demand was insufficient, under Rule 38 (c) and (d), to entitle petitioner to a jury trial upon its crossclaims against its co-defendants. Counsel urge that the crossclaims of defendants were a lawsuit, distinct and separate from Williams' suit against the three defendants, and that, in the absence of a demand for jury trial by one or more defendants upon their crossclaims, they were not to be tried to a jury at the time Williams' case was heard.

This contention ignores the fundamental purpose of the Federal Rules as to crossclaims, which is to have all questions disposed of in a single trial, with a minimum of expense, and as speedily as possible, consistent with the proper administration of justice. This contention is not supported by Rule 38. An examination of that rule, in its entirety, demonstrates the error in counsels' logic. If one party to a lawsuit demands jury trial of "any issues triable as of right by a jury" no other party is required to make a demand for jury trial, and the case will stand for trial to a jury upon all issues,

including those presented by crossclaims of defendants. It is only when one party limits his demand to specified issues that other parties are required to file a demand. That such was the intention of the framers of the Rules of Civil Procedure is further shown by paragraph (d) of Rule 38, that "a demand for trial by jury, made as herein provided, may not be withdrawn without the consent of the parties." Petitioner's counsel, at the trial, objected to separate trials upon the crossclaims because to do so would deprive defendants of a jury trial (R. 298).

It is quite apparent, we submit, that respondent, Williams, having demanded a jury trial of all issues, no request for a jury trial on the crossclaims was necessary to entitle any crossclaimant to have his fact issues submitted to a jury.

Significantly, while the trial court apparently accepted the contention of respondents' counsel, the Court of Appeals for the Eighth Circuit Court did not so construe Rule 38. The decision of that Court is predicated solely upon the discretion conferred upon the trial court by Rule 42(b).

We pointed out in our original petition that the Federal Rules of Civil Procedure contemplate a single trial of all issues, including crossclaims, unless an order for separate trials of particular issues is made in advance of the trial. In the case at bar the trial court made no order for separate trials, as such, but merely excluded all of petitioner's evidence which he felt pertained to the crossclaims. The discretion to order separate trials of particular issues obviously means a judicial discretion,

not an unlimited discretion, or a discretion to be exercised in an arbitrary or capricious manner.

In the case at bar, the action of the trial court in effect making an order for separate trials while ruling upon the admissibility of evidence tendered by petitioner, as we have pointed out, materially changed the scope of the issues on trial after all of plaintiff's evidence in chief had been introduced. No case, even remotely sanctioning such arbitrary procedure in a jury trial, has been found by counsel on either side.

Counsel for Respondent Williams cite but two cases on this phase of the matter, and Union Pacific's counsel cite but one. The case of *United States v. Yellow Cab Company, et al.*, 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523, does not support respondents' contentions. In that case four passengers in a Philadelphia taxicab were injured when it collided with a U. S. mail truck, and they sued the cab company for damages in a U. S. Court. Defendant impleaded the United States as a third party defendant, as provided by the rules. The United States moved for dismissal of the action, as against it, on the ground that the Federal Tort Claims Act did not authorize joinder of the United States as a third party defendant. The District Court overruled the motion, tried the case without a jury, rendered judgment against the cab company in favor of the injured plaintiffs, and provided that, upon payment of the judgment, the cab company was entitled to judgment over against the United States for one-half the amount. This Court, speaking by Mr. Justice Burton, said:

> "If special circumstances had demonstrated the inadvisability, in the first instance, of impleading

> the United States as a third party defendant, the leave of Court required by Rule 14 could have been denied. If, at a later stage, the situation had called for a separation of the claims, the Court could have ordered their separate trial. (Fed. Rules of Civ. Proc. 42 (b)). The availability of third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings."

We submit, therefore, that the *Yellow Cab case* cited by counsel in support of the decision below, instead supports petitioner.

The other case cited is a Seventh Circuit Court of Appeals decision, *Meyercheck v. Givens*, 180 F. (2d) 221. That was an action by Meyercheck, and others, against their landlord to recover rent overcharges and attorneys' fees for violation of the Rent Control Act. Defendant contended that there was a misjoinder of parties plaintiff, and that the district court lacked jurisdiction. With respect to the joinder question, the Seventh Circuit Court of Appeals said:

> "A reading of Rule 20 (a) and (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A., makes it plain that a wide discretion is vested in the trial court relative to the joinder of parties, as well as separate trials. * * * But of more importance, no request was made of the court for separate trials by motion or otherwise, and no complaint was made as to misjoinder. The question is raised for the first time in this court."

Further comment on this phase of the case seems unwarranted. Nothing contained in the Briefs of respondents tends, in any manner, to support the unprecedented action of the trial court in ordering separate trials, after

all of plaintiff's evidence had been taken, and the record made, in reliance upon the issues as they stood at the opening of the trial.

II.

In Division II of their briefs counsel for respondents attempt to answer petitioner's claim that the courts below erred in holding petitioner, Rock Island, solely responsible for the condition of the boxcar, and in holding Union Pacific entitled to a directed verdict. With respect to these contentions counsel for Union Pacific charge at pages 3 and 4:

> "there is no evidence in this case that the railroad companies and the elevator (Williams' employer) 'pooled' the cars so supplied,"

and that

> "Union Pacific did not have possession of the car prior to the accident, did not know that it was to have the shipment over its line, and had no opportunity to make the inspection."

These statements ignore the fact that Union Pacific had sufficient possession of the car to issue the bill of lading for its transportation a few hours after Williams was injured; also ignore the evidence of Carl A. Stump, elevator superintendent that it was the usual custom to take cars, supplied by one railroad, and apply them for shipment via another line (R. 330); also the undisputed testimony of Elmer E. Smith, petitioner's local agent, who stated that the car supply at the elevator is pooled (R. 463). These contentions also ignore the admission set forth in the pleadings of Union Pacific that, on many occasions, cars sent to the elevator by one railroad were

shipped out via other lines (R. 73), and Union Pacific was aware of that custom.

Counsel for respondents have made certain concessions which, it appears to us, very definitely simplify the questions presented by the second division of our petition.

First: At page 15 of their brief counsel for Williams say:

> "As the petitioner knows, a switching carrier has no duty to inspect, and, therefore, has never been held liable for a defective car. It seeks to have itself so classified."

In view of this concession, if the position of petitioner Rock Island, at the time of Williams' injury was that of a mere switching line we are in agreement with counsel for respondent that Rock Island is in no manner liable, because it was under no duty to inspect, or otherwise exercise care for Williams' safety. We have contended throughout this litigation, that petitioner *at the time of Williams' injury* was a mere switching agent for Union Pacific.

Second: Counsel for both Williams and Union Pacific vehemently deny that they have ever contended, or now contend, that Rock Island's position as a switching line, moving the car from the elevator to Union Pacific makes it responsible for the condition of the car. This concession is very helpful to a proper disposition of the questions presented.

We have pointed out in our petition that although the boxcar in question was sent to the elevator by Rock Island in response to an order from Kansas Grain for

empty cars for loading, Kansas Grain loaded the car for outbound movement via Union Pacific, because the grain Company had so contracted with its vendee Houlton Grain Company. See evidence of James K. Franks (R. 336-338 and R. 463 and 464) and Exhibits 19 and 20 reproduced R. 465 and 467.

Under these facts then it is undisputed that Kansas Grain took Rock Island Car 145287 and used it exactly as though it had been supplied by Union Pacific in the first instance, with the acquiescence of both Rock Island and Union Pacific. It seems apparent to us that Kansas Grain by taking the car for its own use in connection with its business with Union Pacific, necessarily changed Rock Island's legal position with respect to the car. Rock Island became a purely switching line, and Union Pacific stepped into the place which Rock Island had occupied. Union Pacific became the supplier of the car, because it was being used in its business, and not that of Rock Island.

It is perfectly apparent, of course, that at some stage of this transaction Union Pacific became primarily responsible for the condition of the car, and for practical purposes made the car its own. The Court of Appeals for the Eighth Circuit has held that Union Pacific had no responsibility for the car until it signed the bill of lading; therefore, Union Pacific was entitled to a directed verdict. This ruling disregards the fact that cars must be loaded, that loading is a part of the outbound movement, and that cars are never billed until loading has been completed. It overlooks the sound and just rule of law that no one may accept all benefits of

a business transaction without also accepting responsibilities. This rule was embodied in petitioner's requested instructions five and six, refused by the trial court (R. 358).

We freely concede that Rock Island, when it sent Car 145287 to the elevator for loading with grain for movement over its railroad owed a duty to exercise reasonable care to supply a car reasonably safe from defects. We concede that if an employee of the elevator had been injured by the defective condition of the car while it was being switched into the elevator, or before the elevator took the car for use of another railroad, then Rock Island should bear the responsibility. But Rock Island certainly owed no duty to supply the elevator with cars for the business of Union Pacific, and we submit, after loading of the car for outbound movement via Union Pacific, Rock Island's obligation was at an end, and the railroad which was then using the car became responsible for its condition. No just rule of law will permit Union Pacific to accept all the pecuniary benefits from the use of a car without assuming responsibility for it.

At pages 13 to 15 of their brief counsel for Union Pacific attempt to answer petitioner's claim that the decision of the Eighth Circuit Court of Appeals conflicts with that of the Iowa Supreme Court in *Jackson v. Chicago, M., St. Paul & P. R. R. Co.*, 238 Iowa 1253, 30 N. W. (2d) 97. Counsel for Union Pacific concede, as they must, that the Iowa Court there said that the duty of inspection rests upon the initial carrier of a car to provide against injuries to the employees of both consignor

and consignee. Counsel say at pages 14 and 15 of their brief:

> "Obviously, you could not apply the term 'initial carrier' to a line which was not the initial carrier at the time of the accident, as was the situation with Union Pacific. The only carrier relationship, as we have pointed out, at the time or prior to the accident aside from the switching by Northwestern, was by the Rock Island."

We desire to first consider Union Pacific's status with respect to Car 145287. It must be remembered that Williams' injury was sustained after the loading of the car for outbound movement had been completed, and while Williams was attempting to close the door of the car. The undisputed evidence shows that the elevator company had contracted to ship this car to Denver, Colo., via Union Pacific. The occasion for Williams' presence about the car was that as an employee of the elevator he was performing the last essential act before physical transportation of the car commenced. Union Pacific was named in the bill of lading as the sole and only carrier. It received the whole revenue from the car, paying Rock Island for its switching service. Under these conditions which railroad was the "initial carrier" of this car? The car was not loaded by the elevator for movement via Rock Island. Rock Island never signed the bill of lading. Union Pacific executed the bill of lading when tendered to it, in the usual course of business just a few business hours after Williams' injury. If we apply the usual meaning to the words "initial carrier" it is perfectly clear that Union Pacific is the only party to which the term can be applied. As the *sole and only* carrier named

in the bill of lading Union Pacific was both the "initial carrier" and the "delivering carrier." It, and it alone, was the carrier with which the consignor of the car had dealings. The Iowa Supreme Court in the *Jackson* case plainly stated that the duty of inspection rested upon the "initial carrier." Had the Court meant to say something entirely different why did it not do so?

Furthermore, it must be borne in mind that the initial carrier is charged with the legal duty of furnishing or supplying a car for movement via its line. The undisputed evidence in the record shows that as to every industry on the Rock Island in the Omaha-Council Bluffs area, except Kansas Grain the initial carrier actually supplies the car to the industry for loading. This practice is in accord with Rock Island Exhibit 22 (R. 434-435), which expressly states that "it is the right and obligation of the line haul carrier" (here Union Pacific) to supply an empty car for loading by an industry served by a switching line.

We desire to point out that the Iowa Supreme Court in its *Jackson* decision did not say that an initial carrier of a car was under a duty to inspect, and otherwise exercise due care, except in cases where a car has been sent to the consignor's place of business by a third party. This exception has been applied, however, by the Court of Appeals. It is quite apparent that the Court of Appeals in the case at bar has held the initial carrier of the car entitled to a directed verdict, contrary to the Iowa Supreme Court's pronouncement in the *Jackson* case.

It is equally plain that the decision below in holding Union Pacific exempt from liability for Williams' injury has departed from a long line of decisions in practically all of the Circuit Courts of Appeal, including the Eighth Circuit itself. As we have heretofore pointed out the courts have generally held that the duty of a railroad arises out of the fact that a business relationship exists between the railroad and the consignor or consignee of a car transported over the railroad's line. Never has a Court of Appeals held a railroad liable except when there was a carrier-shipper or carrier-consignee relationship present.

Counsel urge that the liability of a railroad arises ex delicto and not ex contractu; and they seem to feel that such fact imposes a liability on petitioner and absolves Union Pacific. As stated in the *Hummel* case, 167 F. 89, the shipper-carrier relationship creates the condition out of which the law creates the duty to exercise care. When the elevator company, with the consent of Union Pacific, took the car supplied by Rock Island and used it in its business dealings with Union Pacific, Union Pacific stepped into the position previously occupied by Rock Island and Rock Island had no more responsibility than the Sante Fe Railroad would have had for a car supplied to the elevator by Union Pacific.

Counsel for Williams say that we have abandoned our claim against Chicago and North Western. This is not correct. Our position is, and always has been, that both Rock Island and North Western were merely switching railroads and that primary liability for Williams' injury is with Union Pacific. We have not asked this Court

to determine the legal issue as to whether under the contract between the parties North Western is under obligation to Rock Island.

We believe that the controlling question is — Upon whom does primary responsibility for the condition of the car *at the time of Williams' injury* rest? If the duty is imposed upon the initial carrier, as the Iowa Supreme Court has held in the *Jackson* case, then the Court of Appeals was manifestly in error in holding Union Pacific owed no duty to Williams and was entitled to have its motion for a directed verdict sustained. If the duty rests upon the initial carrier then Rock Island was entitled to a directed verdict, or in the alternative to now have judgment over against Union Pacific.

If both railroads were under a joint obligation then the Court of Appeals was wrong because it is conceded that Iowa now follows the rule of contribution between joint tort feasors contrary to the earlier pronouncements of its Supreme Court.

We submit that the questions presented by the petition justify a hearing of the case upon its merits by this Court. We pray that the petition for certiorari be granted, and that this Court reverse the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

No. 367

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Petitioner and Appellant Below,

vs.

W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY, and CHICAGO & NORTH WESTERN RAILWAY COMPANY,

Respondents and Appellees Below.

RESPONDENT W. E. WILLIAMS' BRIEF RESISISTING PETITION FOR CERTIORARI

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Where a plaintiff demands a trial by jury of any issue in the cause filed by him triable of right by a jury and a defendant files cross-claims against its co-defendants praying that "the Court find, determine and adjudicate" its rights against its co-defendants if a judgment be obtained by plaintiff against it but does not file a demand for jury trial on the issues raised by it in its cross-claims, plaintiff's demand for jury trial does not inure to the benefit of such defendant on its cross-claims. Under such circumstances a trial court does not err in holding that the cross-claims should be tried separately and in refusing evidence bearing solely on issues raised by such defendant's cross-claims.

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In the Supreme Court of the United States

No. 367

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,

Petitioner and Appellant Below,

vs.

W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY, and CHICAGO & NORTH WESTERN RAILWAY COMPANY,

Respondents and Appellees Below.

RESPONDENT W. E. WILLIAMS' BRIEF RESISISTING PETITION FOR CERTIORARI

STATEMENT OF CASE

The statement of the case contained in the opinion of the United States Court of Appeals for the Eighth Circuit as set out in Appendix A, Page 19, et seq., of the Petition for Writ of Certiorari, is generally sufficient for the purposes of this resistance and, for the sake of brevity will not be repeated except as to facts pertaining to the issues raised by the Petition.

SUMMARY OF POINTS TO BE ARGUED AND AUTHORITIES RELIED ON BY RESPONDENT, WILLIAMS

I.

Where a plaintiff demands a trial by jury of any issue in the cause filed by him triable of right by a jury and a defendant files cross-claims against its co-defendants praying that "the court find, determine and adjudicate" its rights against its co-defendants if a judgment be obtained by plaintiff against it but does not file a demand for jury trial on the issues raised by it in its cross-claims, plaintiff's demand for jury trial does not inure to the benefit of such defendant on its cross-claims. Under such circumstances a trial court does not err in holding that the cross-claims should be tried separately and in refusing evidence bearing solely on issues raised by such defendant's cross-claims.

Rules 38 (c) and (d), Federal Rules of Civil Procedure.

Rule 20 (b), Federal Rules of Civil Procedure.

Rule 21, Federal Rules of Civil Procedure.

Rule 42 (b), Federal Rules of Civil Procedure.

II.

Petitioner, the railroad which supplied, furnished and delivered Rock Island box car RI 145287 to Respondent Williams' employer for grain loading, owed this respondent the duty to exercise reasonable or ordinary care to inspect such car and have it in such repair or condition that it could be used with reasonable safety or to

give notice or warning of the defects in the door and track mechanism of such car.

75 C. J. S. 333 (Railroads, § 924 (d)).

Jackson vs. C. M., St. P. & P. R. R. Co., 238 Iowa 1253, 30 N. W. 2d 97, 99, 100, and cases cited therein.

44 Am. Jur. 654 (Railroads, § 433, Defective Cars).

Copeland vs. Chicago, B. & Q. R. Co. (CA-8), 293 F. 12.

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Waldron vs. Director General of Railroads, (CA-4), 266 F. 196.

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ARGUMENT

POINT I.

Where a plaintiff demands a trial by jury of any issue in the cause filed by him triable of right by a jury and a defendant files cross-claims against its co-defendants praying that "the Court find, determine and adjudicate" its rights against its co-defendants if a judgment be obtained by plaintiff against it but does not file a demand for jury trial on the issues raised by it in its cross-claims, plaintiff's demand for jury trial does not inure to the benefit of such defendant on its cross-

claims. Under such circumstances a trial Court does not err in holding that the cross-claims should be tried separately and in refusing evidence bearing solely on issues raised by such defendant's cross-claims.

The facts in the instant case support the decision of the Trial Court in ordering separate trials and refusing to receive evidence bearing solely on issues raised by petitioner in its cross-claim and the affirmance of such order by the Court of Appeals for the Eighth Circuit.

On February 4, 1955, this respondent (plaintiff in the original action) filed his Complaint in the District Court of the United States, Southern District of Iowa, Western Division (R. 1). On March 9, 1955, within ten days after defendants had filed Answers to the Complaint, plaintiff filed demand for jury trial of any issue "triable of right by jury" (R. 18). On March 16, 1955, the first pre-trial conference was held (R. 18). On September 8, 1955, a second pre-trial conference was held (R. 51). On the same date that the second pre-trial conference was held defendant, Rock Island (petitioner herein) filed cross-claims against defendants, North Western and Union Pacific in which it prayed that "in the event any liability is imposed on this defendant" that the "Court find, determine and adjudicate" its rights against the other defendants (R. 45, 51). Copy of said cross-claims were not served upon this Respondent or his counsel nor was a copy of the cross-claim of the North Western against the Rock Island, which had been filed August 18, 1955, served upon this Respondent or his counsel. Neither this Respondent nor the Honorable William F. Riley, Judge of the District Court, had any knowledge

of said cross-claims or the nature thereof at the time of the second pre-trial conference so naturally no question as to separation of trials was raised at that time by either this Respondent or the Court. The defendants had knowledge thereof but they raised no question with regard to separation of trials.

The plaintiff first learned of said cross-claims on the day the second pre-trial conference was held when counsel for plaintiff happened to see a copy of the Rock Island cross-claim that was delivered to defendant, Union Pacific. Counsel then made inquiry whether any other defendants planned to file cross-claims against their co-defendants and was advised that the defendant, North Western, had already filed a cross-claim against defendant Rock Island and planned to do so against defendant, Union Pacific, and that defendant, Union Pacific, planned to file cross-claims against the other defendants.

This Respondent, after reading the cross-claims, never raised any question regarding separation of trials as it appeared obvious from the prayers thereof that the proceedings thereon would be held separately as the relief prayed therein was bottomed on the plaintiff making a recovery against one or more of the defendants, in which event it was prayed that the *Court* make the requested findings and adjudications. The other respondents and the the Court likewise so interpreted the cross-claims.

The first time the trial Court found it necessary to declare its position with regard to separate trials was when petitioner (defendant, Rock Island) attempted to introduce evidence pertaining solely to issues raised by its cross-claims, which consisted of certain contracts and

agreements which it had allegedly entered with the other defendants and to which plaintiff was not a party. Petitioner claims it was surprised by this declaration. This Respondent contends petitioner could have been no more surprised by this declaration by the Court than the Court and the respondents were surprised by petitioner's contention that the plaintiff's case and the cross-claims should be tried in the same proceedings. All except petitioner had presumed from the reading of the pleadings that the plaintiff's claim would be tried to a jury and then, if plaintiff obtained a verdict against one or more of the defendants, the Court would proceed to hear the evidence on the cross-claims (R. 299).

This Respondent contends that the demand for jury trial made by him did not give the Petitioner a right to a jury trial as to the issues raised by its cross-claims.

Rules 38 (c) and (d), Federal Rules of Civil Procedure, provide:

"(c) SAME: SPECIFICATION OF ISSUES. In his demand a party may specify the issues which he wishes so tried otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

"(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

This Respondent in his demand for jury trial specified that issues in the cause filed by him triable of right by a jury be so tried. The demand did not encompass issues that might later be raised by any defendant who might file a cross-claim against one of its co-defendants. Under Rule 38 (c), Federal Rules of Civil Procedure petitioner was not entitled to presume his cross-claims would be tried to a jury, let alone presume said cross-claims would be tried in the same proceedings as plaintiff's claim. Petitioner did not file a demand for jury trial and, therefore, under Rule 38 (d), Federal Rules of Cicil Procedure, waived its right to have the issues raised in its cross-claims so tried.

This Respondent also contends that the trial Court did not abuse its discretion in holding that the plaintiff's claim and the various cross-claims should be tried separately.

Rule 20 (b), Federal Rules of Civil Procedure, provides:

> "(b) SEPARATE TRIALS. The court may make orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice."

Rule 21, Federal Rules of Civil Procedure, provides:

> "* * * Any claim against a party may be severed and proceeded with separately."

Rule 42 (b), Federal Rules of Civil Procedure, provides:

"(b) SEPARATE TRIALS. The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

From the reading of the above rules it is readily apparent that the Trial Court has wide discretion in ordering separate trials where the entry of such an order serves the ends of justice and prevents prejudice to any of the litigants. The case of *Meyercheck vs. Givens*, 180 F. 2d 221, so holds. In 3 Moore's Federal Practice 2908, Professor Moore states that the Court may proceed on motion of any party or on its own initiative at any stage of the action and may prescribe "such terms as are just." The statement of petitioner in its Petition under the heading "grounds on which jurisdiction is invoked" notwithstanding, this Court, in considering Rule 42 (b) in case of *United States vs. Yellow Cab Company*, 340 U. S. 543, 71 S. Ct. 399, held that this rule gives the Court ample power to deal with a problem by ordering a separate trial of any claim or of any separate issue or issues. A review of the pleadings and facts as well as the record of the trial in the instant case will readily disclose why the trial Court felt it incumbent to clarify its position when Petitioner attempted to adduce evidence pertaining to its contracts and agreements with the other defendants. When it became obvious that the appellant was attempting to modify the common-law rights of the plaintiff, which rights were in tort and not in contract, by introducing evidence or seeking to introduce evidence of alleged contractual ar-

rangements entered by defendants, it was obvious to the Court and apparently to all parties except Petitioner that to permit such procedure could result only in utter confusion in the minds of the jury and prevent them from determining the primary issue between plaintiff and defendants as to whether or not the defendants or any of them were guilty of actionable negligence which might entitle Williams to the right to recover damages from one or more of the defendants. It is well-established law that the defendants, by contract, cannot alter the common-law duty that any of them might have to a plaintiff. If the law were otherwise, it would be impossible for a person injured as a result of a negligent act ever to be certain that he was pursuing his claim against the right party.

The sole issues that existed in the controversy between Williams and the railroads in the instant case were as to negligence, contributory negligence, proximate cause and damages. The trial Court extended itself in affording Petitioner every opportunity to adduce testimony and evidence with regard to these issues. However, in pursuance of the ends of justice, it wisely recognized that to admit evidence involving the internicine warfare among the railroads before the jury could only lead to confusion in the minds of the jury and defeat the substantial ends of justice which it had the duty to protect. None of the proffered testimony would have had any bearing on the common-law duty which the Courts have imposed upon railroads furnishing cars to a shipper. Instead, it was all directed toward the issues of contribution or indemnity which only became pertinent and material in the event an adverse verdict were re-

turned against one or more of the defendant railroads. The North Western and Union Pacific recognized this fact (R. 299). Repeatedly the Court advised counsel for the Petitioner that the exclusions of the proffered testimony on trial before the jury did not mean that such evidence and testimony would be considered immaterial and irrelavant on trial of the issues between the defendants on their cross-claims (R. 284, 287, 288, 297, 300, 315, 347, 351). In fact, upon the trial of the cross-claims before Mr. Justice Charles W. Whittaker (then United States Circuit Judge serving as District Judge by assignment due to the illness of the Honorable William F. Riley) petitioner was permitted to introduce all evidence pertaining to the alleged contracts and agreements entered between the various defendants.

In the trial of plaintiff's case it appears that the Petitioner hoped that it would be able to adduce this immaterial and irrelevant evidence from its witnesses and thus confuse the Court and jury as to the ultimate issue of negligence. Evidently it felt that if it could show that it received no revenue from the handling of this car and that the shipper-carrier relationship which it had anticipated would materialize at the time that it furnished and delivered the offending car did not, in fact, materialize, that it would have an emotional argument to make to the jury. In its argumenf accompanying its Petition it appears that it is seeking to do the same thing before this Court. However, it is to be pointed out that the Petitioner has generally benefited from its method of furnishing cars to the Kansas Grain Company. The record in this case discloses that during January and February of 1953 the Rock Island received the line-haul reve-

nue from 51 cars shipped from the Kansas Grain Company over its line which had been furnished to Kansas Grain Company by other railroads (R. 463).

A review of the record in the instant case will readily disclose that the Petitioner was not prejudiced by any action taken by the Trial Court but instead every benefit was extended to the Petitioner, short of reversible error, in permitting the case to go to the jury against all three defendants rather than solely against the Petitioner.

POINT II.

Petitioner, the railroad which supplied, furnished and delivered Rock Island Box Car RI 145287 to Respondent Williams' employer for grain loading, owed this Respondent the duty to exercise reasonable or ordinary care to inspect such car and have it in such repair or condition that it could be used with reasonable safety or to give notice or warning of the defects in the door and track mechanism of such car.

The legal principles applicable in the instant case are set out very clearly in 75 C. J. S. 333, *et seq.* (Railroads, Sec. 924 (d)), as follows:

> "A railroad company owes a duty to all persons who are required to go on or about its cars or cars which are furnished or delivered by it in connection with its business to exercise reasonable or ordinary care to inspect such cars, and to have them in such repair or condition that they may be used with reasonable safety, or to give notice or warning of defects in such cars which are discoverable by due inspection to persons who are entitled to such notice or warning. These duties may be owing to the shipper and to his employees, with respect to loading,

or to the consignee and to his employees, with respect to unloading. A breach of a duty of this natures constitutes negligence, and, for such a breach, the railroad company may be liable for resultant injury to the person to whom the duty is owing, including the shipper, an employee of the shipper, any other person rightfully about the car in connection with loading or shipment, the consignee, or an employee of the consignee. The liability of the railroad company to a shipper's employee for furnishing a defective car arises ex delicto and not ex contractu, and the duty does not depend on the existence of a contract relationship."

These principles have been consistently followed by every jurisdiction confronted with a case similar to that presently before this Court, statements of petitioner in its petition under the heading, "Grounds on which Jurisdiction is Invoked" and in its argument under the heading "The Liability of the Railroads" notwithstanding.

The Courts generally recognize that the liability of a railroad company to a shipper's employee for furnishing a defective car arises ex delicto and not ex contractu and the duty to furnish a car free from defects does not depend on the existence of a contract relationship. (See *Pennsylvania Railroad Co. vs. Hummel*, 167 F. 89, 92 (CCA 8) 541; *St. Louis-San Francisco Railroad Company vs. Ewan* (CCA 8), 26 F. 2d 619; *Waldron vs. Director General of Railroads* 266 F. 196.) Despite the consistent pronouncement by the Courts in this regard, Petitioner tenaciously holds to its viewpoint that the shipper-carrier relationship must exist before it can be held liable for injuries sustained by an employee of a shipper to which it has furnished a car. In its brief before the Court of Appeals for the Eighth Circuit it

felt the emphasis of the word "carrier" would prove to be the magic key that would release it from its bonds of this Respondent's judgment. Before this Court it appears for the first time to feel that the magic words are "in connection with its business." We submit to the Court that there can be no question but what the furnishing of railroad cars by a railroad to a shipper which does extensive shipping on its line is an activity in connection with that railroad's business. At the time that Rock Island Box Car RI 145287 was delivered to the Kansas Grain Company, this Respondent's employer, the petitioner fully anticipated that it would receive said car for shipment or other cars which had been furnished said shipper by other railroads, in lieu thereof (R. 412). The petitioner was the only railroad that had an opportunity or a duty to inspect said car prior to its delivery. It is obvious that the petitioner recognized its duty to inspect said car as it had said car inspected by its car inspector, one Bert Neuman, prior to delivering the car for spotting at the Kansas Grain Company and had it carded "O. K. for grain loading" (R. 228, 301). The petitioner no longer contends that it was free from negligence in making such inspection but in fact admits that there were defects in the car (P. 4, Petition for Writ of Certiorari).

In taking the position that the Court of Appeals for the Eighth Circuit has failed to follow Iowa substantive law, Petitioner continues to fail to recognize the factual distinction existing in cases in which the plaintiff is an employee of a consignee of a car rather than an employee of a shipper. The Courts generally recognize that when the person injured is an employee of a consignee

the duty to furnish a car free from defects rests upon all railroads having a duty and opportunity to inspect the car. Thus, in the case of *Jackson vs. C. M. St. P. & P. R. R. Co.*, 238 Iowa 1253, 30 N W. 2d 97, where an employee of a consignee was injured, the Iowa Court held the Milwaukee Railroad, the initial carrier of the offending car, liable for supplying a defective car. That the Iowa Court did not look to see whether or not a contract relationship existed between the plaintiff and defendant is obvious when one reads the case. The Iowa Court couches its language solely in tort. It views an employee of a consignee as an "invitee" to whom defendant owed the duty of reasonable care. It does not search for any contractual relationship—either that of shipper-carrier or carrier-consignee—upon which to hinge the right-duty relationship, but looks solely to a basis for tort liability. The cases cited by the Iowa Court are the same cases upon which this respondent relies as further authority for his position. While this is the only Iowa case in point, it is obvious that the principles of substantive law to be gleaned from the Iowa decision are consistent with the principles applied by the various federal and other state courts.

In all of the cases cited by the Petitioner, the Court will find that the Court having jurisdiction of the case held only such railroads liable as had an opportunity or duty to inspect the car. Thus in cases involving injuries to an employee of the shipper, the railroad furnishing the car has always been held liable. In cases involving an employee of a consignee of a car, the initial carrier or delivering railroad has been held liable as they each have a duty to inspect the car before accepting same for

a line-haul over their line. As neither an intermediate carrier nor a switching carrier have the opportunity or duty to inspect a car the Courts have never held such carriers liable for furnishing defective cars. We see no reason to review each of the cases separately due to the fact that the same general principles apply in each case.

As the petitioner knows a switching carrier has no duty to inspect and therefore has never been held liable for a defective car it seeks to have itself so classified. However, the facts do not bear it out in this regard. The petitioner furnished the car on an order placed by this Respondent's employer (R. 228, 412, S. R. 3). Before the car was placed it was inspected by one of petitioner's car inspectors and carded "O.K. for grain loading" (R. 228, 301) as it recognized its duty to furnish a car free from defects. It was a customary practice for it so to do as it knew it was the only railroad that had a duty to inspect the car. While it anticipated it might receive the car for line-haul, it is obvious it was not too much concerned whether it received the same car back or not as the method used by the grain elevator did not work a hardship upon it. In December, 1952, January, 1953 and February, 1953 it had furnished 70 cars to the elevator, only 16 of which were returned to it for line-haul (R. 462). However, in January, 1953 and February, 1953, it received the line-haul on 51 cars furnished by other railroads (R. 463), making a total of 67 cars for which it received the line-haul revenue. We presume the reason it did not include the total number of cars furnished by other railroads and for which it received the line-haul revenue during the same 3-month period used in showing cars furnished by it was because

it actually received more cars for line-haul revenue than it furnished. During the same 2-month period as that used in showing the 67 cars received by it which were furnished by it or by others, Petitioner only furnished 62 cars (R. 462, 463).

It is interesting to note that before this Court Petitioner no longer contends the North Western is liable. This is because it finally recognizes that the North Western was only a switching carrier which took the car from Petitioner for placing on this Respondent's employer's side track, and therefore had no duty to inspect the car.

Petitioner erroneously states in its petition that this Respondent has at times taken the position that since Petitioner was called upon to switch the car back to the Union Pacific such facts constitute a basis for holding that the car was being used in Petitioner's business when this Respondent sustained his injury. While this Respondent has not taken such position we do not believe such position to be entirely without merit. There is no question but what the Petitioner is in the business of furnishing cars to shippers, switching cars and delivering cars along its line. We certainly do not see how Petitioner can hope to confine its business solely for the purpose of this litigation. This Respondent is certain this Court will experience no difficulty in seeing through the shallow argument that this Respondent's employer was not a "shipper" as far as Petitioner is concerned and therefore it owed it or its employees no duty. If it is not a "shipper" the Petitioner has been receiving a tremendous amount of revenue from a source heretofore unknown in railroad circles, and did so during the

two-month period it used in formulating Exhibits 25 and 26.

Petitioner also takes the untenable position that the lower courts in the instant case have held that the Union Pacific only can become liable by signing a bill of lading. A reading of the decisions of the lower courts will readily disclose that the lower courts simply held that Union Pacific could not be liable because it did not have an opportunity to inspect the car prior to the time that this Respondent sustained his injuries. Under the record in the instant case the Union Pacific has established that it did not even have knowledge that the offending car was sitting on a side track in Council Bluffs, Iowa, and was to be shipped over its line until the day after the accident. The Courts felt that under such circumstances it certainly could not be held liable for failure to inspect the car.

This Court may wonder why this Repsondent named all three railroads as defendants if it is so convinced Petitioner is liable. Until shortly before the Statute of Limitations was to run on this Respondent's claim he had been negotiating with petitioner on his claim. Shortly before the running of the Statute Petitioner for the first time took the position it was not liable but instead the North Western and Union Pacific were liable. While counsel for this Respondent in the short time remaining could find no authorities shifting the liability as Petitioner contended, in order to preserve the claim he felt it necessary to include the other two railroads as defendants. Counsel frankly admitted in answer to an inquiry by Mr. Justice Whittaker, when he presided at the trial on the cross-claims, and to the Court of Appeals

for the Eighth Circuit that he could not find any basis for their liability other than it might exist under the cross-claims and stated his belief Judge Riley permitted the case to go to the jury against said defendants solely to prevent the necessity of retrial if the appellate courts decided they should have so remained due to the pendency of trial on the cross-claims.

SUMMARY

Rule 19 (1) of the Revised Rules of this Court provides.

> "(1) A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are important and special reasons therefor * * *."

This Respondent does not feel that this case falls within the requirements. Rule 42 (b) has been construed by this Court. Further, the facts in the instant case disclose that the Trial Court merely performed an obvious necessity when it refused to permit Petitioner to attempt to confuse the jury with issues upon which it had waived a jury trial by failure to make a timely demand therefor. With regard to the substantive law, there is no inconsistency between the law applied by the Trial Court and the Court of Appeals and the substantive law of the State of Iowa nor with the substantive law applied in the other Circuits. Further, there is no question of great public importance that necessitates this Court making a pronouncement of public policy.

For these reasons this Respondent feels the petition for writ of certiorari in the instant case should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

No. 367

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY and CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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To the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 245 F. 2d 397.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Judgment of the Court of Appeals was entered June 6, 1957.

The jurisdiction of this court is invoked under 28 U. S. C. A. Section 1254.

In its brief petitioner sets forth under the above heading certain reasons why it says "Review by this Court of the decision of the Court of Appeals for the Eighth Circuit is required." These alleged reasons will not be discussed at this point but will be taken up later.

QUESTIONS PRESENTED FOR REVIEW

Under the above heading, petitioner states what it calls three major questions. The first of these is as follows:

> "Does the discretion to order separate trials of particular issues vested in a District Judge, by Rule 42, Federal Rules Civil Procedure, authorize such an order, in a jury trial, over the objections of a defendant, after the trial has commenced, opening statements of counsel have been made, and evidence of plaintiff has been completed, thereby changing the issues on trial and restricting the scope of evidence which may be offered by defendants, when no application for such order is made by any party, and no intimation was given at the opening of the trial that such order might be made?"

The foregoing question fails to call attention to the fact that the issues as to the cross-claims were not issues as to the plaintiff in the court below; that the separation of the trial on the cross-claims from the trial on the main case did not in any way change the issues; that no jury trial was requested by any party, including the petitioner, as to the issues arising on the cross-claims.

The second question set forth by petitioner is as follows:

> "When it appears that empty freight cars are supplied to a large industrial shipper for loading for outbound shipment by numerous railroad companies, and it is the custom and practice of the shipper, acquiesced in by the railroad companies, to substantially pool the cars so supplied, and load and bill them out on any line of railroad selected by the shipper, and an employee of the industry sustains injury after loading of a car, supplied by one railroad, has been completed for outbound movement on another railroad selected by the shipper, over which the car is immediately billed, does primary liability for defects in the car rest upon the railroad in connection with whose business the car had been loaded, or upon the railroad which supplied the car to the shipper?"

The second question is not based upon the facts in this case. There is no evidence in this case that the parties pooled the cars so supplied. The statement of the question completely leaves out the fact that in this case, as in all such cases where a railroad company delivered a car to the shipper, such railroad car was first of all inspected by the railroad company delivering the car (in this case the petitioner Rock Island); that in fact in the instant case the Rock Island did inspect the car and that its inspection covered the defects found to have resulted in the injury to respondent Williams (R. 301-302), and in fact Rock Island, in delivering the car to the shipper, did so expecting to get the shipment back over its line, and in connection with its own business (R. 412). It further ignores the fact that respondent Union Pacific Railroad Company did not have possession of the

car prior to the accident, did not know that it was to have the shipment over its line, had no opportunity to make the inspection (R. 333, 342). It states that the car was immediately billed for shipment on another railroad. This is not true; the billing was not made until the day following the happening of the accident (R. 342). Nor was the car being loaded in connection with the business of the railroad over which it was shipped (R. 333, 342).

The third question is:

> "Under the circumstances stated above is the railroad company which accepts billing on the shipment, which transports the car to destination, and collects the revenue for such transportation, exempt from liability for defects in the car which might have been discovered by reasonable care?"

The third question, aside from being based on the erroneous statement of facts contained in the second question, again completely ignores the fact that the railroad which accepted billing on the shipment did not have physical possession of the car prior to the accident, did not accept billing on the car until after the accident (R. 342), did not have an opportunity to inspect the car prior to the accident, and could not have discovered the defects by reasonable care or any other care for the simple reason that it had no opportunity to exercise any degree of care whatsoever.

STATEMENT OF THE CASE

For convenience, Petitioner Chicago, Rock Island & Pacific Railroad Company will be referred to herein as the Rock Island, Respondent Union Pacific Railroad Com-

pany will be referred to as Union Pacific, and Respondent Chicago and North Western Railway Company will be referred to as North Western.

In this case petitioner Rock Island was found liable to the respondent Williams for common-law negligence in furnishing a defective car for loading to his employer, which resulted in Williams' injury. No other ground for relief was prayed for by respondent Williams against any defendant (R. 1-9).

Judgments were entered in favor of respondent Williams and against petitioner on the jury's verdict and against respondent Williams and in favor of respondents Union Pacific and North Western on the jury's verdict (R. 497-498). The verdicts in favor of Union Pacific and North Western were not appealed from and are final.

In this case petitioner Rock Island had cross-claimed against Union Pacific and North Western contending that if petitioner was held liable to respondent Williams that such respondents should be held liable over to it on the theory that they were primarily liable to respondent Williams. At the close of petitioner's evidence on the cross-claims, motions for dismissal were sustained by the District Court (R. 481; 483-486). These judgments were affirmed by the Circuit Court of Appeals.

It should be pointed out that petitioner's cross-claim against Union Pacific did not proceed on any theory that Union Pacific had contracted to indemnify petitioner Rock Island for Rock Island's own negligence, but simply on the theory that Union Pacific was primarily liable to respondent Williams and that petitioner Rock Island's lia-

bility was only secondary (R. 51).

There are so many inaccuracies in, and so much material evidence is left out of petitioner's statement of facts, particularly concerning the handling of the car, that Union Pacific feels the only practical way to meet the situation is to make its own statement in this connection.

Respondent W. E. Williams was an employee of Kansas Grain Company at the grain elevator owned by the grain company located at or near 30th Street and First Avenue in the City of Council Bluffs, Iowa (R. 220). Said elevator is located upon and served by certain sidings which are connected to a track commonly referred to and designated as the River Track (R. 220). The sidings referred to above are located in Council Bluffs, Iowa, and said sidings are operated and maintained by the North Western, Rock Island, and Chicago, Burlington and Quincy Railroad Companies, and owned by the North Western (R. 95; 281). Under agreements between the three last mentioned railroads, the North Western performs all switching on the said River Track and its sidings (R. 340). Union Pacific was not on February 10, 1953, and never has been a party to any agreement concerning the so-called River Track or its sidings (R. 94; 281).

On or about January 28, 1953, Kansas Grain Company placed with the office of the local freight agent of the Rock Island at Omaha, Nebraska, an order for 35 empty box cars for loading with grain by Kansas Grain Company (R. 340). It was the standard custom and practice of railroads such as the Rock Island, when sending cars to be loaded by the Kansas Grain Company, to

inspect such cars for defects and suitability for loading for grain prior to delivery by the railroad company from whom the cars were ordered (R. 301-302); if in the opinion of the inspecting railroad the cars were free from defects and suitable for loading for grain, such cars were then carded by such railroad for such commodity.

On February 7, 1953, preliminary to complying with the aforementioned order, the Rock Island undertook to make and did make an inspection of car RI 145287 (a car belonging to it and in its possession) for defects and suitability for loading for grain, and okayed the car for grain and carded the same "OK for grain loading" (R. 301-302).

Petitioner refers to the inspection of the car made by Bert Neumann, a Rock Island employee, on February 7, but does not set forth the type of inspection that was made. This inspection was the regular inspection given all cars sent in by Rock Island to the Kansas Grain Company, whether they expected to load them out over their line or not, and the evidence shows that it was an inspection of the mechanisms and various portions of the operating portion of the car, including the door mechanisms, the door rail, posts, etc. Rock Island's inspector testified that in inspecting the car, it was Rock Island's custom to inspect for other defects, aside from whether or not the car is able to carry grain. He said he looked at the trucks, the undercarriage, and the doors and the floor, gave it a complete check. He said:

> "I examined the wheels and truck sides, also looked at the sill steps and handles; I inspected all safety appliances, the sills and the running board on

top. * * * In inspecting car 145287 I looked underneath the car, also made an inspection of the door posts." (R. 301-302.)

He testified that this inspection was the one that he made whenever cars were sent to Kansas Grain Company (R. 302-303).

On February 9, 1953, car RI 145287, along with two other cars, was set out on the 17th Street connecting track to the River Track by a switch crew of the Rock Island and delivered to the North Western pursuant to the order of the Kansas Grain Company previously referred to (R. 340).

Whenever occasion arose for outbound shipments of grain to be made, officers or employees of Kansas Grain Company in Omaha, Nebraska, called the elevator foreman in Council Bluffs, Iowa, and would give instructions for the elevator employees to load cars, specifying the type of grain and the size of the cars to be loaded (R. 329). The grain company employees at the elevator then would load a car with what was thought to be the specified type and grade of grain (R. 332) and samples would be taken for grading by inspectors of the Omaha Grain Exchange (R. 332). As soon as the sample of grain was taken as aforesaid, the car door would be closed by employees of Kansas Grain Company and the car sealed (R. 332). After the grading of the car, the officers and employees of Kansas Grain Company in Omaha then would advise their elevator foreman in Council Bluffs, Iowa, by telephone of the destination to which the car was to be shipped and the railroad over which it would be routed (R. 331). The destination and routing of a

particular car were not determined until after the result of the grading was known (R. 333). The result of the grading would not be known in any case until after the car door was closed and sealed (R. 341). In selecting cars for outbound loading, the employees of Kansas Grain Company at the elevator would select the specific cars from the supply available. In selecting cars for loading, the elevator employees of the grain company would follow the practice of loading cars received on specific order for movement over the line of railroad furnishing the empty car, but in some instances such practice was not strictly followed (R. 330). If, however, a railroad did not receive back the particular car or cars which it delivered to the grain company it nevertheless would receive loads for transport over its own line equaling in number the number of cars which such delivering carrier had delivered (R. 330).

Car RI 145287 was loaded with shelled corn at the elevator of Kansas Grain Company on the afternoon of February 10, 1953, by employees of said elevator company (R. 233). After the car was loaded and in the afternoon of February 10, 1953, a sample of the grain was taken from the car for the purpose of having it graded (R. 253). Upon the sample being taken, the employees of the grain company started to close the door on said car, when the accident referred to in the complaint occurred at approximately 4:15 P.M., February 10, 1953 (R. 234).

After the accident and on the following day, that is, February 11, 1953, the sample of grain was graded at the Omaha Grain Exchange in Omaha, Nebraska (R. 332).

Upon the completion of the grading on February 11, 1953, the Kansas Grain Company's employees in Omaha, Nebraska, determined the destination and routing of said car (R. 333).

On February 11, 1953, a bill of lading for shipment of said car from Council Bluffs, Iowa, to Denver, Colorado, was prepared by employees of Kansas Grain Company at Omaha, Nebraska, and received by the Union Pacific on such date (R. 342), (R. 309-311).

On February 11, 1953, car RI 145287 was inspected by representatives of the Rock Island and the North Western after said accident, before the said car was removed from Kansas Grain Company's elevator track. The car was taken by the Rock Island to the repair track of the Rock Island in the City of Council Bluffs, Iowa (R. 343), and the door thereon was rehung without the car being unloaded or the shelled corn therein removed (R. 90).

On February 23, 1953, car RI 145287 was switched by a Rock Island switch crew to the Union Pacific in Council Bluffs, Iowa (R. 91). The said car was inspected by the said Union Pacific on February 24, 1953 (R. 344), and was bad ordered at that time for worn brake heads and because a door was out of the top door track (R. 231). Repairs were completed February 24, 1953 (R. 231), and thereupon Union Pacific transported the car to Denver, Colorado, over its own line of railroad (R. 231).

ARGUMENT

The argument of the petitioner does not really present an argument with respect to two of the three alleged questions which it presents for review at all. In fact, the court will note, on going through the argument, that two of the points are not specifically taken up. Its argument proceeds more in line with Points (a), (b) and (c) under the heading "Grounds on Which Jurisdiction is Invoked." Accordingly, in this argument we will devote a portion of the same to demonstrating that each of the points referred to is not well taken.

A. The ruling of the Court of Appeals relative to the separation of the issues was not erroneous.

Petitioner's Point (a) is as follows:

> "(a) The Court of Appeals for the Eighth Circuit has erroneously decided an important question of Federal Law arising under the Federal Rules of Civil Procedure, and particularly Rule 42 thereof, which has never been previously decided by this Court, but which should be here determined."

The foregoing point is simply a condensation of the first point set forth by petitioner under the heading, "Questions Presented for Review." We have previously pointed out under our analysis of these questions that petitioner failed to call to the court's attention the fact that the only request for jury trial was by Williams (R. 18); the issues between crossclaimants were not issues as to Williams. (See Rule 38 (d), Federal Rules of Civil Procedure.) Accordingly, while the judge announced that he would consider in his capacity as a judge trying the cross-claims at a later date any relevant and material evidence that might be presented in the jury trial applicable

to the cross-claims, that no evidence could be presented to the jury which was not also material and relevant to Williams' case against the railroads. The case, insofar as the jury was concerned, therefore, was a trial of the issues as between Williams and the respective railroads (R. 299-300).

The complaint herein is entirely based on the theory that the railroads were negligent either severally or jointly and concurrently. The same specific allegations of negligence are made as to each railroad (R. 1-9).

Aside from the foregoing it has been held many times that the Court has a broad discretion as to the separation of issues. Here we have pointed out the issues on the cross-claim were not issues as to respondent Williams. To have heard them at the same time as the issues which were pertinent as to him would only serve to confuse the issues. The Court's ruling in this regard was clearly in accord with Rule 20 of the Federal Rules of Civil Procedure, which provides:

> "The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice."

Rule 21, supra, provides in part as follows:

> "* * * Any claim against a party may be served and proceeded with separately."

Rule 42 (b), supra, provides as follows:

> "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any

claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

In *Meyercheck v. Givens*, 180 F. 2d 221, it was pointed out that under these rules a wide discretion is vested in the Court.

Clearly, the foregoing contention is not a novel point of law or one erroneously decided, but the holding was an entirely correct one under very definite rules of law.

B. The decision of the Court of Appeals is not in conflict with the pronouncements of the Iowa Supreme Court on the same subject.

Petitioner's Point (b) is as follows:

"(b) The Court of Appeals for the Eighth Circuit has decided an important question of Iowa law in a way directly in conflict with the pronouncements of the Iowa Supreme Court on the same subject."

Petitioner's proposition here is that the decision in the instant case conflicts with the Iowa case of *Jackson v. Chicago, M., St P. & P. R. Co.*, 238 Iowa 1253, 30 N. W. 2d 97. It is our position, first, that this case in no way sustains petitioner's position, as it contends; second, that it in fact sustains the position taken by the respondents; and third, that the decision of the Circuit Court of Appeals in this case is not in conflict with this decision, but is in accord with it.

The factual situation in the Iowa case immedintely discloses that the case does not support petitioner's theory at all. In the Iowa case the carrier held liable had actual physical possession of the car prior to the

accident and had an opportunity to inspect the same, just the opposite of the facts in this case where Union Pacific had no possession and no opportunity to inspect. The Milwaukee had delivered the car involved in the *Jackson* case empty to a shipper at Hobarton, Iowa, to be loaded and transported to Swift at Des Moines. The Milwaukee delivered the loaded car in Des Moines to the Des Moines Union Railway at 6:10 P.M., October 16, 1944. The car was delivered to the Swift plant by defendant Great Western October 20. The plaintiff, an employee of Swift & Company, was injured while attempting to unload the car on October 21. He brought the action against the initial carrier, the Milwaukee, and the delivering carrier, the Great Western, claiming that they were negligent in furnishing a car in a dangerous and defective condition for Swift's employees to unload. A verdict was returned by the jury against the Milwaukee. Upon appeal, the case was affirmed.

The court said at pages 99 and 100 of the opinion as follows:

> "When an initial carrier furnishes a car to a shipper to be loaded with freight and then delivered to a consignee whose servants are to unload the car, it is charged with the duty to exercise ordinary care to see that the car is in such state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of unloading it."

Insofar as its use of the term "initial carrier" is concerned, the Iowa Supreme Court was, of course, using the term in its application to the facts of that case, in which case the initial carrier had actual physical posses-

sion of the car prior to the injury. Obviously, you could not apply the term "initial carrier" to a line which was not the initial carrier at the time of the accident, as was the situation with Union Pacific. The only carrier relationship, as we have pointed out, at the time or prior to the accident, aside from the switching by North Western, was by the Rock Island (R. 430).

It is obvious from the foregoing that Iowa follows the general rule that liability is based solely on negligence, and the case supports the holding of the Court of Appeals for the Eighth Circuit in that regard.

C. The decision of the Court of Appeals for the Eighth Circuit does not conflict with decisions of the Court of Appeals of any other circuit or with its own previous decisions.

Petitioner's Point (c) is as follows:

> "(c) The Court of Appeals for the Eighth Circuit has rendered a decision which directly conflicts with the decisions of the Court of Appeals for the Third, Fourth and Sixth Circuits, and in conflict with previous decisions of the Eighth Circuit Court of Appeals itself, on the same subject."

Apparently here, although it is not entirely clear, petitioner claims that the instant decision is in conflict with the case of *Pennsylvania Railroad Co. v. Hummel*, a case decided by the Court of Appeals for the Third Circuit, 167 F. 89, and the Fourth Circuit case of *Waldron v. Director General of Railroads*, 266 F. 196. Although petitioner also says that the decision is in conflict with a decision of the Sixth Circuit, we do not find any reference made to any decision of the Sixth Circuit. It is our position that the decision of the Eighth Circuit Court of

Appeals in no way conflicts with the two above referred to cases, or with any of its other prior decisions.

In discussing the above cases, petitioner contends at page 22 of its brief that the above cases hold that there must be a shipper-carrier or carrier-consignee relationship out of which the duty to inspect arises. Any reading of these two cases clearly shows that the cases do not hold any such thing. It is true that in each case there was a shipper-carrier relationship but the decisions did not rest upon that ground. Both cases are distinguishable on the facts also since in each case the carrier held liable had actual physical possession of the car prior to the accident, with an opportunity to inspect.

In the *Hummiel* case the court makes it very clear that liability was not predicated upon contract but upon tort. This was a falling door case. The court said at page 91 of the opinion:

> "It was conceded on the argument that the liability of the defendant, if any, does not arise out of any contract."

The court, in its opinion, pointed out that if an act of negligence be immediately dangerous to the lives of others, the wrongdoer is liable to the injured party, regardless of contract, saying at page 93 of the opinion:

> "The opinion in that case, however, clearly concedes that, if an act of negligence be immediately dangerous to the lives of others, the wrongdoer is liable to the injured party whether there be any contract between them or not." (Citing cases.)

The *Waldron* case is simply authority for the proposition that whenever a carrier such as the Rock Island

furnishes a car to a shipper for loading for shipment, it is liable to the shipper or his employee for injury due to a defect in the car which might have been discovered by reasonable care in inspection. At page 198 of the opinion, the court stated the rule as follows:

> "The following statement of the law will hardly be questioned, as required by reason and comparison of the principles announced in the cases below cited. A carrier, furnishing cars to be loaded for shipment, is liable for injuries to the shipper or his employe, due to a defect in the car which might have been discovered by reasonable care in inspection. The carrier cannot impose this duty to furnish cars reasonably safe on the shipper, to its own relief from liability for injuries to an employe of the shipper. If the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employe to be loaded, the carrier and shipper are both liable to the injured employe; for the proximate cause of the injury is the defective car. But as between the carrier and the shipper the liability of the carrier is primary, for the reason that the shipper has a right to assume that cars furnished have been inspected by the carrier and found reasonably safe."

There is nothing in this case that says anything at all to the effect that there must be a shipper-carrier relationship between the parties. It is the furnishing of the car for the purpose of being loaded for shipment as the Rock Island did in this case, that places upon the carrier furnishing the car the duty to see that the car is free from defects which might have been discovered by reasonable care in inspection.

Clearly, the decision of the Eighth Circuit Court of Appeals is strictly in accordance with the foregoing cases

and not in conflict with it.

Petitioner suggests that the Eighth Circuit Court of Appeals decisions in the cases of *St. Louis-San Francisco Ry. Co. v. Ewan*, 26 F. 2d 619, and *Copeland v. Chicago, B. & Q. R. Co.*, 293 F. 12, are contrary to the instant decision. This is simply not true. Both cases clearly support the court's ruling, hold that liability is based solely on negligence and that it arises ex delicto, not ex contractu.

The leading case in the Eighth Circuit on the question of a carrier's liability for injuries arising out of a defective freight car is the case of *Copeland v. Chicago, B. & Q. R. Co.*, 293 F. 12. This case clearly sets forth the rule that a carrier is not an insurer as to the safety of its cars and is only liable for negligence. At page 15 of the opinion the court states the rule as follows:

> "*A carrier is not an insurer of the absolute safety of its freight cars and their equipment. It is held only to reasonable care.* It is bound to deliver to consignor for loading, and consignee for unloading, cars in reasonably safe condition for those who are to handle the freight in and out of them." (Emphasis ours.)

In the case of *St. Louis-San Francisco Ry. Co. v. Ewan*, 26 F. 2d 619, the court said:

> "* * * If the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employee to be loaded, the carrier and shipper are both liable to the injured employee; for the proximate cause of the injury is the defective car. But as between the carrier and the shipper the liability of the carrier is primary, for the reason that the shipper has a right to

assume that cars furnished have been inspected by the carrier and found reasonably safe.' Waldron v. Director General of Railroads (C. C. A.), 266 F. 196, 198.

"2. The liability of the carrier does not arise out of contract but out of a duty imposed by law. Pennsylvania Railroad Co. v. Hummel (C. C. A.), 267 F. 89, 94."

At pages 25 and 26 of its brief, the petitioner refers to the case of *Rick v. New York, C. & St. L. R. Co.*, 81 A. 650, a Pennsylvania decision. In this case, plaintiff, a consignee's employee, was injured in unloading a car of iron because of a hole in the floor of the car. This case is in no way authority upon the facts or the law. In the *Rick* case the defendant railroad had an opportunity to and did inspect the car when it was first received by it from the Erie Railroad Company, then discovered a defect and returned it to the Erie Company. In a few days it was again delivered to the defendant and again inspected and this time it was accepted; still another inspection was made by defendant prior to the accident.

In other words, in the *Rick* case the defendant not only had an opportunity to inspect but did inspect on three separate occasions. Thus we find again that the factual situation in the *Rick* case not only does not support the statement made by the petitioner as to what the facts were, but also shows that the factual situation was completely contrary to the instant case, where the railroad sought to be held, insofar as petitioner is concerned, the respondent Union Pacific, had no possession of the car prior to the accident as did the defendant

in the *Rick* case, had no opportunity to inspect as did the defendant in the *Rick* case, and did not inspect as did the defendant in the *Rick* case.

Petitioner says it is not liable on the theory that it was not a carrier of the car; that there was no contract relationship prior to or at the time of the accident.

Actually, although we do not consider it necessary to liability on the part of Rock Island to the plaintiff in this case, we feel that there was a shipper-carrier relationship between Rock Island and Kansas Grain Company with respect to this car until it was billed for shipment over Union Pacific's line and notice thereof given to Union Pacific. No other theory makes sense. Rock Island receives an order from the grain company for box cars to be loaded for grain (R. 340). Rock Island proceeds to supply such cars, among which is the alleged defective car (R. 340); it inspects the car, giving it what is purported to be the same inspection it would give a car it expected to be loaded for shipment over its own line, and then causes a placard to be placed on the car stating that it was "OK for grain loading" (R. 302-303). It then switches the same to the North Western for the purpose of having the North Western spot the car at the grain company pursuant to the company's original order to be loaded for grain (R. 340). Without any change in the relationship between the parties to this point, the employees of the grain company proceed to load (R. 341) and close the car, when one of them, the plaintiff, is injured (R. 236).

From the foregoing, it is clear that there was a contract between the shipper, the grain company, and Rock

Island, whereby the Rock Island agreed to furnish a car, this car, to the grain company for loading with a shipment, which might or might not be shipped over Rock Island's line; knowing this, Rock Island undertook all duties in connection with the obligation of furnishing a proper and safe car for the purpose ordered. The grain company in its turn agreed to either ship the load in this car over Rock Island's line or ultimately give Rock Island another load in a car furnished by some other railroad in return therefor (R. 330). In fact, Rock Island's counsel admitted that it sent the car to the grain company expecting that a shipper-carrier relationship would materialize and that the car was furnished in connection with the business of Rock Island (R. 412)

The period of time which is actually involved in the determination of liability in this case commences with the ordering of the box cars by the Kansas Grain Company from the Rock Island on January 28 or 29, 1953 (R. 340), and terminates with the happening of the accident on February 10, 1953 (R. 236). During this period of time the Union Pacific had nothing to do with this car.

Aside from the foregoing, it is clear from the cases heretofore cited that liability does not depend on a contract or carrier relationship. At page 19 of its brief, petitioner quotes a portion of the first sentence only of the following from 75 C. J. S., Sec. 924, p. 333. The balance of the sentence and the following quotation from such section show that the same is directly contra to petitioner's position. It should also be noted that petitioner, in quoting the portion of the sentence that it did, misquoted, by leaving out in the third line from the top of the quotation, the words "or delivered by it":

"*A railroad company owes a duty to all persons who are required to go on or about its cars or cars which are furnished or delivered by it in connection with its business to exercise reasonable or ordinary care to inspect such cars, and to have them in such repair or condition that they may be used with reasonable safety, or to give notice or warning of defects in such cars which are discoverable by due inspection to persons who are entitled to such notice or warning.* These duties may be owing to the shipper and to his employees, with respect to loading, or to the consignee and to his employees, with respect to unloading. A breach of a duty of this nature constitutes negligence, and, for such a breach, the railroad company may be liable for resultant injury to the person to whom the duty is owing, including the shipper, an employee of the shipper, any other person rightfully about the car in connection with loading or shipment, the consignee, or an employee of the consignee. *The liability of the railroad company to a shipper's employee for furnishing a defective car arises ex delicto and not ex contractu, and the duty does not depend on the existence of a contract relationship.*

"A railroad company is not an insurer of the safety of its cars with respect to persons working on or about such cars, or of the safety of persons working on or about defective cars furnished or delivered by the company, and liability with respect to a defective car is only for negligence. *The company is not liable for injuries from defects which it has had no opportunity to discover,* from defects which no reasonably careful inspection would have uncovered, or from defects apparent to an ordinarily intelligent person." (Emphasis ours.)

Again, we emphasize that the joining of the Union Pacific as a party defendant in this case was an effort on the part of the plaintiff to join as a party defendant and charge that party with negligence which never had

an opportunity to use due care or any other kind of care with respect to this particular car, and which had no obligation to do so.

Petitioner also, on page 2 of its brief, sets forth a fourth point, which is as follows:

> "(d) The Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings in the application of the Federal Rules of Civil Procedure, and in the application of established rules of law to specific facts, and has sanctioned such departures by the District Court for the Southern District of Iowa, as to call for this Court's power of supervision."

The above is obviously an extremely general statement that calls the attention of the court to no specific thing and under such circumstances we do not feel that we are in any position to argue it. Particularly is this true in view of the fact that no attempt is made to argue the same in the "Argument" presented in petitioner's brief. We deny the truth of the statement in toto.

The petitioner has spent a major portion of its argument setting up and destroying a "straw man." At pages 23, 24 and 25 of its brief the petitioner argues that after the accident its relationship to the car was simply that of a switching carrier and makes the statement at page 23:

> "At times it has been suggested by counsel for Williams and other respondents that, since petitioner was called upon to switch the car back to Union Pacific, such fact constitutes a basis for holding that the car was being used in petitioner's business when Williams was hurt."

This statement refers to a movement after the accident. No such argument as above stated was ever made by any party to this lawsuit. No argument was based upon any proposition that liability could be predicated, insofar as petitioner was concerned, upon its handling of the car subsequent to the accident. Liability was predicated, as is shown by the record, the pleadings, the opinion of the Circuit Court of Appeals, upon the negligence of the petitioner in connection with its handling of the car prior to the accident. It is significant that at no place does counsel for the petitioner suggest or point out that the Circuit Court of Appeals or the District Court in any way relied upon the handling of the car by Rock Island subsequent to the accident as a basis for liability. At pages 24 and 25 petitioner sets forth eight citations (all, incidentally, having to do with the shipment of freight or having to do with questions of rates, and having no application to personal injury cases) upon this question, which was not a material issue in the case. The question in this case, insofar as petitioner is concerned, is with respect to what it did or did not do prior to the happening of the accident and not subsequent thereto.

D. The decision of the Court of Appeals for the Eighth Circuit was correct in denying indemnification or contribution to petitioner.

Rock Island does not, as is apparent from the pleadings (R. 45), the evidence, and its contentions as set forth in its brief, claim that Union Pacific had by contract agreed to indemnify Rock Island against the results of its own negligence. Its theory for indemnity is that its right arises by operation of law because it claims

Union Pacific was, as between Rock Island and Union Pacific, primarily liable to plaintiff.

There was, of course, no contract of indemnity between Union Pacific and Rock Island. The only agreements between the parties were as to the agreements relating to interchange, per diem, etc. No reference whatsoever is made in such agreements as to indemnity of any kind, let alone for personal injury or indemnification against the consequence of another railroad's negligence, such as Rock Island's.

Rock Island could recover over against Union Pacific only if it had been held liable by the jury by reason of Union Pacific's primary negligence, but this is just the converse of what the jury has found. Union Pacific has in fact been found not to have been guilty of any negligence whatsoever, and this, of course, is what the evidence clearly shows.

Indemnity implies a basic or primary liability in one person though a second is also liable with the first to a third.

The general rule as to indemnity from another's wrong is well stated in 42 C. J. S., Sec. 21, at page 596, as follows:

> "The law is well settled that where one who is secondarily liable is compelled to respond in damages to the injured party, he may recover the amount paid from the person primarily liable. * * *
>
> "This rule, however, rests entirely upon the proposition that as between two persons, both of whom are liable to the injured party for damages, there is a primary and a secondary liability, they not being

joint tort-feasors and in pari delicto as to the wrong causing the injury.

> "It is a well-recognized rule that an implied contract of indemnity arises in favor of a person *who without any fault on his part* is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, the former having a right of action against the latter for indemnity." (Emphasis ours.)

The general rule in Iowa as to liability with respect to indemnity, apart from express contract, is well stated in the case of *Rozmajzl v. Northland Greyhound Lines*, 242 Iowa 1135, 49 N. W. 2d 501, an Iowa case decided by the Supreme Court of that state in 1951. In that case the court said at page 506 of the opinion as follows:

> "One who is liable only by reason of a duty imposed by law for the consequences of another's negligence may recover over against the active perpetrator of the wrong. So a servant is liable to his master who is not at fault for damages the latter is compelled to pay a third person because of the servant's negligence."

Rock Island is always placed in the position of having to concede the fact that it has been found guilty by the jury of an act of negligence proximately causing the injuries to the plaintiff. Obviously if this was not the fact, there could be no judgment with respect to which Rock Island could seek indemnity. Obviously, under the evidence in this case Rock Island was no passive party. Thus Rock Island starts out with the impossible situation, in seeking indemnity, that it has been determined to have been the *active* perpetrator of the wrong done the plaintiff, and under the Iowa law, the active perpetrator of

the wrong never can seek indemnification; indemnification can only be awarded the party held liable only by reason of passive negligence.

In the case of *Lewis v. United Air Lines Transport Corporation* (USDC, D. Connecticut), 34 F. Supp. 124, 127, it was said:

> "But Air Lines overlooks the well established rule that one whose active negligence has been adjudicated cannot, in an action over, invoke the judgment as proof of his liability to the tort claimant and still escape its effect as a determination of his own primary liability precluding any recovery over."

Here Rock Island seeks to invoke the judgment of its liability to plaintiff as proof of Union Pacific's liability to it, and at the same time escape its effect as a determination of its own primary liability, which precludes any recovery over. This it cannot do.

Rock Island finally suggests that possibly the law of contribution as recently set forth in the decision of the Iowa Supreme Court in 1956 in the case of *Best v. Yerkes* (Iowa), 77 N. W. 2d 23, may possibly have some application, and while Rock Island says it does not know whether Rock Island and Union Pacific are joint tort-feasors, it claims there is such a possibility, and obviously is hoping that as a last resort the court will find that such is the fact. Of course, it is perfectly obvious that whatever else Union Pacific may be in this case, it is not a joint tort-feasor with Rock Island.

The factual situation in the *Yerkes* case can be summarized, insofar as pertinent herein, by stating that it involved a head-on collision between an automobile of

the plaintiff and the defendant's vehicle. It was claimed that one of the defendants negligently slowed down and stopped in front of the other defendant's vehicle, causing the second defendant's vehicle to collide with the plaintiff's vehicle. This is a case that clearly shows active, joint, concurring negligence by both defendants. Obviously this factual situation is in no way comparable to the instant case.

In the *Yerkes* case, the Iowa Supreme Court, at page 27 of the opinion in the Northwestern Reporter, said:

> "We have many times expressed the general rule that there can be no contribution between joint tort-feasors. But we have not squarely met and decided the precise question with which the instant case confronts us. It is this: Assuming that *active* but unintentional *negligence* of two parties *concurs* to injure a third party, do the two tort-feasors have a right of contribution against each other?" (Emphasis ours.)

The statement of the question alone here shows that the case has no application to the instant situation for the very simple reason that there must be *active negligence* of two parties *concurring* to injure a third party in order to have joint tort-feasors and contribution. Here, at most, there has been active negligence found as to but one party, the Rock Island. As a matter of fact, there is no finding of active or passive negligence of any other party but Rock Island.

We have previously demonstrated that Union Pacific cannot be shown to have been guilty of any act of negligence toward the plaintiff whatsoever.

But even if it could be argued that each party was actively negligent, such negligence could not have been concurrent. There would have been no relationship whatsoever between the acts of negligence and they would not have combined to produce the injury. If Rock Island was negligent, its duty arose and was violated several days prior to any possible duty arising or being violated on the part of Union Pacific, even under Rock Island's theory. Also, any such negligence would have been unrelated and not have combined to produce the injury.

In the case of *Kittleson v. American District Telegraph Co.*, 81 F. Supp. 25, a case decided in 1948 by the United States District Court, Northern District of Iowa, Judge Graven said, in discussing the question of the law of concurrent negligence under the Iowa law, that:

> "Under the Iowa law where separate and independent acts of negligence by different participants *combine* to produce a single injury, the negligence of the participants is regarded as being concurrent in character * * *." (Emphasis ours.)

The above case was reversed on appeal, but not in this connection.

In the *Kittleson* case, the negligence of the two defendants, although independent acts, nevertheless combined to produce the injury. Here, even if both parties were negligent, they did not combine, as required under Iowa law, to produce the injury, and certainly the two distinct acts of negligence would be successive and unrelated in operation, and as said in 65 C. J. S., Sec. 110, page 681: "If two distinct causes are successive and unrelated in operation, they cannot be concurrent."

It is perfectly clear that the basic ingredients of the contribution rule are not present in the factual situation in this case, and accordingly the doctrine would have no application under any circumstances.

CONCLUSION

Petitioner has not made a showing entitling it to a review by this court. It is clear that the decision of the Court of Appeals for the Eighth Circuit is not in conflict with the decisions of any other circuit or its own, is not in conflict with the decisions of the Supreme Court of Iowa, it did not erroneously decide the question arising as to the separation of the issues, nor did it wrongly decide any other question. We think it is clear that the decision was entirely correct and proper.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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